

EXHIBIT 6

*Phil Paul v.
Intel Corporation*

*Hearing
May 1, 2007*

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**Phil Paul v.
Intel Corporation**

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May 1, 2007**

1
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:)
INTEL CORP. MICROPROCESSOR)MDL Docket No. 05-MD-
1717-JJF)
ANTITRUST LITIGATION,)
PHIL PAUL, on behalf of)
Himself and all others)
similarly situated,) Civil Action No. 05-485-JJF
Plaintiffs,) CONSOLIDATED ACTION
v.)
INTEL CORPORATION,)
Defendant.)
Tuesday, May 1, 2007
10:00 a.m.
Courtroom 4B
844 King Street
Wilmington, Delaware

BEFORE: SPECIAL MASTER VINCENT J. POPPITI
APPEARANCES:
RICHARDS, LAYTON & FINGER
BY: FREDERICK L. COTTRELL, III, ESQ.
-and-
O'MELVENY & MYERS, LLP
BY: JENNIFER LASER, ESQ.
Counsel for AMD

Page 2

APPEARANCES CONTINUED:
POTTER, ANDERSON & CORROON, LLP
BY: RICHARD L. HORWITZ, ESQ.
-and-
BINGHAM MCCUTCHEON, LLP
BY: RICHARD A. RIPLEY, ESQ.
Counsel for Intel
PRICKETT, JONES & ELLIOTT
BY: J. CLAYTON ATHEY, ESQ.
-and-
COHEN, MILSTEIN, HAUSFELD & TOLL
BY: DANIEL A. SMALL, ESQ.
BY: BRENT W. LANDAU, ESQ.
-and-
FINKELSTEIN THOMPSON, LLP
BY: RICHARD M. VOLIN, ESQ.
BY: KAREN J. MARCUS, ESQ.
Counsel for Class Plaintiffs
MORRIS, NICHOLS, ARSHT & TUNNELL
BY: MARY B. GRAHAM, ESQ.
-and-
QUINN EMANUEL
BY: ROBERT W. STONE, ESQ.
-and-
FRY'S ELECTRONICS
BY: BRIAN D. HENRI, ESQ.
Counsel for Fry's Electronics

Also Present:
David Carlkthoff, Esq.

Page 3

[1] **SPECIAL MASTER POPPITI:** Good morning, [2] all. This is a time we've set for a hearing on [3] class plaintiffs' application to compel Fry's [4] Electronics, Inc. to produce transactional data [5] in response to the subpoena issued on June 23rd [6] of 2006.

[7] Counsel, before we proceed, let's [8] make a record of all those that are present, [9] please.

[10] **MR. ATHEY:** Good morning, Your [11] Honor. Clayton Athey from Prickett, Jones & [12] Elliott.

[13] **SPECIAL MASTER POPPITI:** Thank you, [14] Mr. Athey.

[15] **MR. ATHEY:** I believe you know my [16] co-counsel, Daniel Small.

[17] **SPECIAL MASTER POPPITI:** I indeed [18] do.

[19] **MR. ATHEY:** Brent Landau from Cohen [20] Milstein as well. And Richard

Volin and his [21] associate, Karen Marcus, from Finklestein Thomas.

[22] **SPECIAL MASTER POPPITI:** Thank you [23] very much.

[24] **MR. COTTRELL:** Good morning, Your

Page 4

[1] Honor. Fred Cottrell for AMD.

[2] With me from the O'Melveny firm in [3] Los Angeles is Jennifer Laser. Jennifer has one [4] of the main roles at O'Melveny on third-party [5] discovery, so I'm sure everybody hopes this may [6] be the last third-party discovery issue.

[7] I think we all know it will not be. [8] So Jennifer is here today to listen and perhaps [9] even participate, if necessary.

[10] **SPECIAL MASTER POPPITI:** Thank you, [11] Mr. Cottrell.

[12] **MR. COTTRELL:** Thank you, Your [13] Honor.

[14] **MR. HORWITZ:** Rich Horwitz from [15] Potter Anderson on behalf of Intel. With me [16] today, Rick Ripley from Bingham McCutcheon.

[17] **SPECIAL MASTER POPPITI:** Nice to see [18] you again, sir.

[19] **MS. GRAHAM:** Good morning, Your [20] Honor. Mary Graham from Morris Nichols on behalf [21] of Fry's Electronics.

[22] And with me are Robert Stone from [23] Quinn Emanuel. He will be arguing on behalf of [24] Fry's today.

Page 5

[1] And also with us are Brian Henri, [2] legal counsel in-house at Fry's. And he's here, [3] both because this is important to Fry's and also [4] in case there — if there's a desire on the part [5] of the Court to hear from him, he'd be happy to [6] address the Court.

[7] **SPECIAL MASTER POPPITI:** Thank you, [8] Ms. Graham. Welcome, counsel.

[9] **MR. STONE:** Good morning, Your [10] Honor.

[11] **MR. HENRI:** Good morning.

[12] **SPECIAL MASTER POPPITI:** Counsel, [13] before we proceed, I think it may be appropriate [14] for me to maybe cut through several of the — at [15] least one of the issues that was raised by virtue [16] of Fry's response to your application.

[17] Fry's contests the jurisdiction of [18] this Court to entertain, that is, consider and [19] rule on your motion. Let me do it this way: I [20] do intend, notwithstanding any other business [21] that we conduct today, to issue a finding, [22] proposed finding and recommendation to Judge [23] Farnan that the Court conclude that this Court [24] does have jurisdiction to entertain the

Page 6

[1] application.

[2] And the reason why I intend to issue [3] a formal document to the Court, notwithstanding [4] anything else I may do today, is so that there [5] can be due consideration by the Court and a [6] ruling. That is, a ruling that gets made for [7] purposes of this district's jurisprudence.

[8] I would note for purposes of [9] creating a very brief record — counsel, you may [10] want to just take your seat for a moment, if you [11] don't mind.

[12] **MR. SMALL:** Sure, Your Honor.

[13] **SPECIAL MASTER POPPITI:** That [14] Fry's — and I will apologize at the front end of [15] this proceeding. There will be some reference to [16] the hearing in advance of the issuance of my [17] report to the Court on the protective order [18] that's in place in this case, and I apologize for [19] referring to the entity as Fry. [20] I would anticipate that there would [21] hopefully be no need to go back and correct the [22] record, but if there is an application to do [23] that, if you'll make note of that, I will be [24] happy to do that.

Page 7

[1] Fry's cites the case of Visx — VI [2] S.X., Inc. versus Nidek, N-I-D-E-K Co., 208 F.R.D. [3] 615. That's 616 in that case. It's a Northern [4] District of California case in the year 2002 — [5] for the proposition that the Chancery Court in [6] multi-district litigation does not have the [7] authority to — the power to enforce a [8] documents-only subpoena.

[9] It is interesting, and I say this [10] gently, that both Fry's and the class ignored a [11] later decision issued by the same Court, which [12] decision declined to follow the Visx decision.

[13] That case is In Re: Welding Rod [14] Products Liability litigation at 406 F.Supp 2d [15] 1064, a Northern District of California case in [16] the year 2005.

[17] In Welding Rod, the Court recognized [18] that the stated purpose of coordinating pretrial [19] proceedings in multi-district litigation is to [20] promote the just and efficient conduct of such [21] actions. And there is a reference in that case [22] at Page 1066.

[23] The Court also acknowledged that [24] most courts that have addressed that very issue,

Page 8

[1] most courts have concluded that 28 U.S.C. Section [2] 1407(b) empowers a multi-district litigation [3] transferee Court to exercise the power of any [4] other district, including the enforcement of [5] documents-only subpoenas. The reference is at [6] Page 1066.

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

[7] I have taken the opportunity, and [8] you'll see this in the written document that I [9] expect will issue in short order to review the [10] relevant case law regarding the authority of a [11] transferee Court in multi-district Court [12] litigation to adjudicate discovery disputes in [13] connection with non-parties.

[14] And I am satisfied that the majority [15] view is the better reasoned approach. And I also [16] would expect that the Third Circuit would adopt a [17] view that it expressed in dicta in the case of *In Re: Flat Glass*, antitrust litigation at 288 F. [19] 3d 83 at note 90. That's the Third Circuit in [20] the year 2002.

[21] That footnote reads in part that [22] Section 1407 (b) "empowers the transferee judge [23] in multi-district cases to act not only on behalf [24] of the transferee district, but also with the

Page 9

[1] powers of a district judge in any district for [2] the purpose of conducting pretrial depositions in [3] such coordinated or consolidated proceedings. [4] I'm mindful that the focus was on the conduct of [5] depositions, but I conclude that the Third [6] Circuit, in examining its own dicta, would take [7] what I conclude to be the better reasoned [8] approach and the majority view."

[9] So I do conclude for purposes of [10] this proceeding that the Court has the authority [11] to entertain the application. Counsel, if you [12] believe there's any need for you to make further [13] record in this regard, I'm happy to permit you to [14] do that.

[15] MR. STONE: We don't believe so, [16] Your Honor.

[17] MR. SMALL: Nothing for the class [18] plaintiffs, Your Honor.

[19] SPECIAL MASTER POPPITI: Thank you. [20] The other thing that I'd like to [21] turn to — just give me one moment, please.

[22] I'd like to have some discussion [23] with you about the protective order that exists [24] in this case. And I'd like the discussion that

Page 10

[1] you all have with me to be framed against the [2] following backdrop, if you will.

[3] I think it's fair to say that the [4] process leading up to Judge Farnan's entry of the [5] protective order in this case was unique to [6] proceedings of this nature. I think it's fair to [7] say that the uniqueness is literally demonstrated [8] by the schedule of opportunities for all parties [9] to have input to the protective order. And all [10] non-parties, third parties to have

input into [11] that protective order.

[12] Without giving the actual deadlines [13] of the process, I don't think it's important to [14] do that in advance of a scheduled proceeding. [15] Fry's, as a third party, along with all other [16] third parties, have the opportunity to provide [17] written objections and comments with respect to [18] the proposed order.

[19] Fry's did that on May the 19th of [20] 2006, along with a host, if not all of the other [21] third parties providing their objections and [22] comments. Subsequent to receiving those [23] comments, and consistent with the scheduling [24] order relating to the protection order of

Page 11

[1] protection, a hearing was conducted on June the [2] 12th of 2006.

[3] I think it's fair to suggest that my [4] style in conducting hearings of this nature was [5] no different on June 12th than it was yesterday [6] or than it will be today. And that is, I believe [7] all of those that were present had a full and [8] fair opportunity to not only explore their [9] objections and comments with the Court, but also [10] had a full and fair opportunity out of the [11] presence of the Court to continue to negotiate [12] provisions of the parts of the protective order [13] that were stipulated.

[14] Fry's did not choose to appear at [15] that hearing, and there were no arguments, [16] therefore, advanced to support Fry's objections [17] and comments. Notwithstanding that, and I think [18] it was very clear before going into the [19] proceeding and it was certainly very clear during [20] the conduct of the proceeding, that all [21] objections and comments that were offered would [22] be considered.

[23] Counsel that was present [24] representing the interest of some third parties

Page 12

[1] in the course of their respective presentations [2] suggested to the Court that notwithstanding the [3] comments in the courtroom, that they were not [4] waiving any of their objections that were made in [5] their written submittal.

[6] In reviewing the decision, not a [7] decision, the report and recommendations [8] regarding the proposed protective order, with [9] respect in particular to Fry's May 19, 2006 [10] filing, reference was made to that filing in a [11] multiple — in a number of places in the document [12] itself. And, in fact, — just give me a minute, [13] please.

[14] With respect to comments made to [15] Subparagraph 6c, and I think these paragraphs and [16] subparagraphs are

all, to some extent, etched in [17] our minds. The Court received comments from Best [18] Buy, Dell, Fry's, Hewlett-Packard, and Microsoft.

[19] Fry's was the only third party that [20] argued for the two-tiered approach that they are [21] presently asking for today.

[22] Fry's also in its submittal of [23] May the 19th, 2006 suggested alternatives if the [24] Court were not to accept the two-tiered approach.

Page 13

[1] And I think it may be important for purposes of [2] this record to read my language with respect to [3] Fry's objections and comments with respect to [4] subparagraph 6c. And that's found at Page 39.

[5] This is a quote. It says, "Fry" — [6] it should read Fry's objects to allowing In-house [7] Litigation Counsel to view its highly [8] confidential sales documents such as [9] industry-wide purchase agreements and sales [10] information. Fry's argues that such information [11] could greatly harm Fry's and the other third [12] parties' ability to negotiate competitive [13] purchase orders and vendor agreements should it [14] be disclosed to the parties to the lawsuit.

[15] Fry's therefore requests that a [16] second "tier" be added to the protective order [17] that would shield "highly confidential" [18] information from disclosure to the parties and [19] their In-house Litigation Counsel.

[20] Fry's offered an alternative. In [21] the alternative, should the Court refuse the [22] request for a two-tiered protective order, Fry's [23] requests that in-house litigation counsel be [24] precluded from viewing confidential documents in

Page 14

[1] their normal place of business and that they only [2] be granted access to view the documents at their [3] outside counsel's office.

[4] I'm sure all remember that that [5] recommendation was one that was not adopted in [6] the ultimate report and in the order as signed by [7] Judge Farnan.

[8] Finally, to the extent that this [9] Court allows in-house litigation counsel to view [10] confidential documents produced by third parties, [11] Fry's requests that the in-house litigation [12] counsel's identity be disclosed to the [13] third parties by revising Paragraph 6c to read [14] "To in-house counsel, identify to the opposing [15] party and any producing party".

[16] That language was, in fact, adopted [17] in the report and was ultimately signed by Judge [18] Farnan.

[19] I would also note that with respect [20] to other third parties' comments,

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

focusing on [21] issues involving the ban, that there was [22] significant discussion on whether the one year [23] was sufficient. There was also significant [24] discussion with respect to what that ban would

Page 15

[1] include. And the Court, at my recommendation, [2] substantially accepted a number of the [3] observations made by Microsoft.

[4] The report and recommendation was [5] entered on the 27th of June of 2006. Subsequent [6] to the entry of that finding and recommendation, [7] there was an opportunity for Fry's and all other [8] parties to file exceptions to the report.

[9] Subsequent to that filing of my [10] report, AMD was the only party that filed [11] exceptions to the report. On September the 26th [12] of 2006, Judge Farnan, after discussing AMD's [13] objections, adopted the proposed protective [14] order, and here we are.

[15] So my question, for purposes of that [16] backdrop, is why should the Court permit Fry's or [17] any other party to ask that the protective order [18] be revisited with all that went into the [19] development of that order?

[20] **MR. SMALL:** Good morning, Your [21] Honor. Dan Small for the class plaintiffs.

[22] **SPECIAL MASTER POPPITI:** Sir, do you [23] have a problem?

[24] **MR. STONE:** Oh, was Your Honor's

Page 16

[1] question to Fry's or —

[2] **SPECIAL MASTER POPPITI:** No. At [3] this juncture, it is plaintiffs' application.

[4] **MR. STONE:** Okay. I'm sorry.

[5] **MR. SMALL:** Your Honor, I think you [6] put it as well as it could be. The nature of the [7] prior proceedings that this Court has already had [8] on the protective order issues, the very full [9] nature of the proceedings, the very careful [10] consideration that this Court gave to all the [11] objections made by third parties, including [12] certainly Fry's.

[13] And it's also the case, Your Honor, [14] that the specific concerns that Fry's is raising [15] now in connection with its opposition to [16] producing any data in this case are the very [17] concerns that Fry's and others raised the first [18] time around. So it's not a situation, Your [19] Honor, where there was some concern not addressed [20] to the Court that the Court was not aware of. [21] It's not a situation where the circumstances have [22] changed.

[23] In fact, the very data that we seek [24] production of today is the very data that was

Page 17

[1] sought by AMD when it served a subpoena on Fry's [2] back in November of 2005, or I think it was [3] October of 2005.

[4] So the circumstances have not [5] changed, Your Honor. And there simply is no [6] reason for the very explanation that Your Honor [7] gave that we should disturb and reopen weeks and [8] weeks of negotiations among the parties and the [9] third parties, as well as very full proceedings [10] that this Court generously gave to all the third [11] parties to participate in the formulation of a [12] protective order that the third parties knew, [13] because they had all been subpoenaed at that [14] point, that they would have to produce under.

[15] There's simply no reason to go back.

[16] **SPECIAL MASTER POPPITI:** Let me ask [17] this question, counsel, because you do this [18] day-to-day every day, and I expect that you have [19] appeared in a number of different courtroom [20] settings.

[21] Are you aware of a process in any [22] other proceeding that you've been involved with [23] where the opportunity to participate literally in [24] the crafting of the initial order was as it was

Page 18

[1] constructed in this case?

[2] **MR. SMALL:** Your Honor, in my [3] experience, I have never been involved where the [4] Court proactively invited the third parties to [5] look at a concrete proposal formulated by the [6] parties for a protective order, where they had [7] the opportunity to look at a concrete draft and [8] give written comments as well as to argue as to [9] the propriety of the language. That kind of [10] proceeding I've never seen.

[11] In all candor, I have seen it where [12] the parties have agreed to or the Court has [13] entered a protective order and then subsequently [14] a third party who has been asked to produce has [15] objected to a particular provision. But never [16] has the third party had the opportunity before [17] the order was entered to object.

[18] **SPECIAL MASTER POPPITI:** I'm aware [19] of that practice, if you will, and I'm aware of [20] the case law that was cited or discussed by [21] Fry's.

[22] **MR. SMALL:** Yes. Those are all the [23] comments I have at this point on the protective [24] order issue.

Page 19

[1] Your Honor, would you prefer to hear [2] from Fry's?

[3] **SPECIAL MASTER POPPITI:** I would [4] prefer to hear that issue first, please.

[5] **MR. STONE:** Thank you, Your Honor. [6] Respectfully, it's Fry's position that things [7] have changed actually since the time that Fry's [8] submitted some comments with respect to the [9] protective order that was ultimately entered in [10] this case.

[11] As you noted, Fry's comments and [12] objections to the proposed protective order were [13] submitted on May 19, 2006. That was more than a [14] month prior to the June 22, 2006 subpoena from [15] class plaintiffs.

[16] When class plaintiffs subpoenaed [17] Fry's, that changed the landscape with respect to [18] both the information being sought from Fry's and [19] the potential for harm that could come to Fry's [20] if its confidential and highly proprietary trade [21] secret information is produced in this case. And [22] I think that the documents before Your Honor [23] demonstrate that it's undisputed that what we're [24] talking about here are highly proprietary trade

Page 20

[1] secret materials of Fry's, materials that provide [2] Fry's with its competitive advantage in the [3] marketplace.

[4] **SPECIAL MASTER POPPITI:** I don't [5] think there's any dispute with respect to that, [6] is there, Mr. Small?

[7] **MR. SMALL:** There's a partial [8] dispute, Your Honor.

[9] **SPECIAL MASTER POPPITI:** Okay. I'll [10] let you develop it at some point.

[11] **MR. STONE:** Also mentioned, Your [12] Honor, a June 12, 2006 hearing which Fry's did [13] not participate in. At that point in time, again [14] that was prior to the time that the subpoena that [15] is currently before the Court issued to Fry's. [16] And it wasn't until December of 2006 when class [17] plaintiffs began a meet and confer process with [18] Fry's that led to where we are today.

[19] And it was through those discussions [20] with counsel for class plaintiffs and the [21] recognition that AMD and Intel would not be [22] seeking this transactional data, at least as of [23] now, but are not participating in this motion to [24] compel, that it became apparent to Fry's that a

Page 21

[1] modification to the protective order was [2] something that they were interested in trying to [3] obtain, given the nature of the materials being [4] sought by class plaintiffs.

[5] **SPECIAL MASTER POPPITI:** So is [6] counsel suggesting that notwithstanding the [7] whereas clauses in the protective order, that I [8] would submit to you contemplates access to [9] transactional data, that notwithstanding that or [10]

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

access to highly confidential information as [11] sensitive and as important as the information [12] that you have described, notwithstanding that, [13] Fry's had no expectation as a third party in this [14] case that the transactional data would not be the [15] subject of third-party subpoena practice?

[16] MR. STONE: I think the question [17] that precisely what transactional data was going [18] to be sought. And I think as Your Honor can see [19] from the back and forth between the parties, that [20] that's been somewhat of a moving target. [21] I think that at the time that Your [22] Honor previously considered Fry's objections, the [23] issue wasn't quite ripe. It hadn't been framed [24] as a result of the ongoing discussions that have

Page 22

[1] taken place between and among the parties.

[2] And so even though in the abstract [3] one could talk about what materials might [4] ultimately be sought, now Your Honor has a fuller [5] record, including declarations from Fry's [6] specifically identifying the trade secret and [7] confidential nature of the materials. And as a [8] result, the Court is in a better position to [9] consider Fry's request.

[10] SPECIAL MASTER POPPITI: Just give [11] me one moment.

[12] (Following a discussion held off the [13] record.)

[14] SPECIAL MASTER POPPITI: I think [15] what I'm hearing you say is that notwithstanding [16] the fact that AMD had already issued the [17] subpoena, and I can tell you I haven't studied [18] that, that that would not have put you on notice [19] that transactional data was expected to be an [20] object of discovery in this case and perhaps [21] ultimately be involved in ultimate proofs in this [22] case.

[23] MR. STONE: There was the potential [24] that they were going to seek such data. Given

Page 23

[1] their current posture, and Intel's current [2] posture not participating in this motion, and [3] those two parties dropping out, and the fact that [4] what they sought was slightly different from what [5] class plaintiffs seek. I don't think that Fry's [6] was on notice with respect to the precise [7] information that we're now discussing.

[8] In addition, it was a different [9] landscape when Your Honor was considering a [10] subpoena from AMD and/or Intel whereas now there [11] are tens and tens of law firms representing class [12] plaintiffs that want to have access to Fry's [13] data.

[14] SPECIAL MASTER POPPITI: Just give [15] me one moment, please, counsel, if you will.

[16] Mr. Small, do you have a copy of the [17] AMD —

[18] MR. SMALL: Yes, Your Honor.

[19] SPECIAL MASTER POPPITI: — subpoena?

[20] MR. SMALL: Would you like me to [21] bring it up?

[22] SPECIAL MASTER POPPITI: Please.

[23] Let's do this: I know it is [24] certainly part of the Court's record. Do you all

Page 24

[1] have your copy or a copy with you?

[2] You do not? [3] How many copies will we need? Do [4] you want three? Four?

[5] MR. STONE: I think three will be [6] helpful.

[7] SPECIAL MASTER POPPITI: Three?

[8] (Following a discussion held off the [9] record.)

[10] MR. SMALL: Your Honor.

[11] SPECIAL MASTER POPPITI: Yeah, [12] please.

[13] MR. SMALL: I would note for [14] everyone's convenience that the AMD subpoena was [15] attached to the Volin declaration, which was [16] submitted with our reply papers as Exhibit F.

[17] SPECIAL MASTER POPPITI: Thank you. [18] That's not in your — that's not [19] Exhibit F of your application; correct, counsel?

[20] MR. SMALL: Right. It was attached [21] to the Volin declaration, which was with the [22] reply.

[23] SPECIAL MASTER POPPITI: Right. [24] Right.

Page 25

[1] MR. SMALL: Your Honor.

[2] SPECIAL MASTER POPPITI: Yes.

[3] MR. SMALL: I apologize to the [4] Court. I was just advised that the subpoena that [5] I gave you was the Intel subpoena, not the AMD [6] subpoena.

[7] SPECIAL MASTER POPPITI: Yeah. I [8] didn't think I saw an AMD subpoena.

[9] MR. SMALL: Yeah.

[10] SPECIAL MASTER POPPITI: I'm kind of [11] happy that I didn't, because —

[12] MR. VOLIN: Your Honor, I apologize. [13] Richard Volin.

[14] The Exhibit F is the AMD subpoena, [15] but what was handed up was Exhibit D, which was [16] the Intel subpoena.

[17] SPECIAL MASTER POPPITI: I didn't [18] remember — just a second.

[19] I have it now. I have it. [20] Please. Mr. Small, you have — I'm [21] going to direct my attention to that document for [22] a

minute. You can do it from the table.

[23] MR. STONE: Thank you.

[24] MR. SMALL: Your Honor, the specific

Page 26

[1] part of the AMD subpoena that addresses the data [2] of Fry's is Request Number 11, all four subparts, [3] but of most interest are subparts c and which is [4] listed under the heading Purchase History.

[5] SPECIAL MASTER POPPITI: Does [6] counsel have that?

[7] MR. STONE: I do now, Your Honor.

[8] SPECIAL MASTER POPPITI: Please.

[9] MR. STONE: And the point I'd make, [10] Your Honor, is that the level of detail sought [11] there is vastly different than the level of [12] detail currently being sought by class [13] plaintiffs. Circumstances change in discovery [14] and —

[15] SPECIAL MASTER POPPITI: I [16] understand that.

[17] MR. STONE: — that's why we're here [18] on a more fuller — on a more full record [19] requesting modification of the protective order.

[20] SPECIAL MASTER POPPITI: And why [21] does the existing protective order not give you [22] protection and the expectation that if there is a [23] violation of the order, a Court standing behind [24] the order of protection?

Page 27

[1] MR. STONE: Well, what I'd say, Your [2] Honor, is that you can't unring the bell. Once [3] the information is out there, and with the vastly [4] greater number of lawyers, and law firms, and [5] parties involved now, the possibility of the [6] information being disclosed, even inadvertently, [7] is much greater.

[8] And so the safeguards that Fry's has [9] requested are common and have been issued on [10] numerous occasions by Judge Farnan.

[11] SPECIAL MASTER POPPITI: I'm aware [12] of this.

[13] MR. STONE: And so we think that [14] would help prevent the possibility of any harm [15] befalling for us.

[16] SPECIAL MASTER POPPITI: Thank you, [17] sir.

[18] MR. STONE: Thank you.

[19] SPECIAL MASTER POPPITI: Mr. Small.

[20] MS. GRAHAM: Your Honor.

[21] SPECIAL MASTER POPPITI: Yes, [22] please.

[23] MS. GRAHAM: I assume you would [24] prefer to hear from just one counsel for each

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

Page 28

[1] party, but if I might impose upon the Court. You [2] had asked a question if counsel was aware of an [3] instance where, under circumstances as here, a [4] protective order had been negotiated with third [5] parties, and then subsequently a third party came [6] in and wanted different provisions.

[7] And I'm not aware of something that [8] satisfies that, but I am aware of a case, an [9] antitrust case here that was being handled by [10] Judge Jordan, and we represent the defendant as [11] does Mr. Cottrell. It's the Tricor litigation [12] against Abbott and Fournier.

[13] And in that case, a protective order [14] had been negotiated at the outset. I don't [15] recall that the Court needed to rule on anything [16] in the case, but it was negotiated. And Abbott's [17] in-house counsel was covered under the protective [18] order to see all information.

[19] This I know, because Abbott is my [20] client. It's a very important provision to that [21] client.

[22] Subsequently, this past fall, the [23] defendants were seeking certain information from [24] Impax, one of the plaintiffs that's a generic

Page 29

[1] pharmaceutical company, and it protested that [2] this information was highly confidential. It was [3] related, I believe, to business-type planning [4] information and financial information, and they [5] took the position that, notwithstanding the [6] protective order, that in-house counsel should [7] not be allowed to see that information. And over [8] the objections of Abbott to modify the protective [9] order, in fact, Judge Jordan said that that [10] information would be produced and not given to [11] in-house counsel.

[12] So we at least have that precedent [13] that where specific information came along later, [14] and certainly this kind of information was in [15] general information that was fully expected to be [16] produced in the case. But notwithstanding that, [17] Judge Jordan took — he held that given the [18] special — how proprietary this information was [19] and was one category of information, that he [20] would modify the protective order to the extent [21] that that information would not go to in-house [22] counsel.

[23] **SPECIAL MASTER POPPITI:** And did I [24] understand your comments to be that the third

Page 30

[1] parties participated in the negotiation of the [2] original order?

[3] **MS. GRAHAM:** That order didn't [4] involve third parties, so I was trying to

make [5] clear that third parties weren't involved there. [6] But that was — Impax is actually a party in that [7] case.

[8] So I would submit that if a party to [9] a case, who certainly is fully engaged in the [10] case or controversy, is negotiating a protective [11] order at the outset and submits it to the Court [12] for entry and later comes along to modify it, and [13] the Court would agree to do it, that the case [14] ought to be stronger in this instance.

[15] **SPECIAL MASTER POPPITI:** What [16] standard did the Court use?

[17] **MS. GRAHAM:** I'm not sure that he [18] articulated a standard, but we could certainly [19] get you the transcript, if that would be helpful.

[20] **SPECIAL MASTER POPPITI:** Yeah.

[21] There was no written decision; it was in the [22] transcript?

[23] **MS. GRAHAM:** I believe it was just a [24] transcript decision, although there probably was

Page 31

[1] a written order that issued.

[2] **SPECIAL MASTER POPPITI:** I'd like to [3] be supplied with the transcript, please.

[4] **MS. GRAHAM:** Okay. We'll do that.

[5] **SPECIAL MASTER POPPITI:** Mr. Small.

[6] **MR. SMALL:** Thank you, Your Honor.

[7] A few things. If the Court were to [8] compare the document request made by AMD in its [9] 2005 subpoena with the document request made in [10] class plaintiffs' subpoena with respect to data, [11] you would see that they're strikingly similar.

[12] Both ask for data on a monthly basis [13] broken down in certain ways. Both for Fry's [14] purchases of computer systems and for Fry's sales [15] of those same computer systems.

[16] So there really is no basis, Your [17] Honor, based on differences, very slight between [18] the AMD and the class plaintiffs subpoenas, for [19] Fry's to argue that it was not fully aware that [20] it would have to produce data exactly of the type [21] we're talking about today.

[22] The only evolution there is, Your [23] Honor, in the negotiations with respect to Fry's [24] data is that the parties have moved from

Page 32

[1] requesting data on a monthly basis to requesting [2] it on a transactional basis. And the reason for [3] that, Your Honor, is it's preferable for the [4] parties to get it transactionally. And we also [5] believe it's less burdensome for the producing [6] party to give it that way if it maintains it on a [7] transactional basis in the ordinary

course of [8] business.

[9] Now, Fry's has represented to us [10] that it does not keep its data on a monthly [11] basis. So when Fry's saw the request for [12] documents sufficient to show their sales and [13] their purchases on a monthly basis, it knew that [14] that would require it to produce it [15] transactionally or to aggregate it for us.

[16] And presumably, since it says it [17] doesn't want to undergo the burden of aggregating [18] by month, that it understood that that meant a [19] transactional production.

[20] **SPECIAL MASTER POPPITI:** Okay.

[21] **MR. SMALL:** A couple other points, [22] Your Honor.

[23] **SPECIAL MASTER POPPITI:** On this [24] issue?

Page 33

[1] **MR. SMALL:** Well, yes. [2] Let me say, too, that when Fry's [3] submitted its objection to the original proposed [4] protective order, that it understood exactly the [5] type of information that it would be asked to be [6] produced in this case. If you look at objection [7] number two, it says, in part, plaintiffs have [8] subpoenaed highly confidential sales documents [9] such as industry-wide purchase agreements and [10] sales information. If that doesn't encompass [11] sales data, I'm not sure what does.

[12] So clearly, Fry's anticipated this [13] kind of production of data. But Your Honor, it's [14] not just what Fry's anticipated, it's also what [15] the Court anticipated.

[16] And there's no doubt that Your Honor [17] and Judge Farnan in dealing with the [18] confidentiality order in this case understood and [19] anticipated that there would be production in [20] this case of highly confidential materials, [21] including the very types of materials that are at [22] issue here.

[23] In the protective order itself, it [24] lists the type of documents that can be

Page 34

[1] designated confidential. Those documents include [2] "non-public pricing information, non-public data [3] concerning sales, revenues, profits, margins and [4] variants, non-public customer lists, non-public [5] data concerning costs."

[6] So the Court was very aware that the [7] data would be included in those categories of [8] documents and in determining that the protections [9] that the order provided were sufficient for [10] documents of that type.

[11] The other point, Your Honor, is that [12] the Court understood very well that there was [13] going to be production of

data or other types of [14] documents that were very sensitive competitively. [15] As Your Honor mentioned, I believe there is a [16] specific whereas clause in the order that says [17] "preparation for trial may require the discovery [18] and use of documents and other information which [19] constitute or contain commercial trade secrets".

[20] The very type of information that [21] Fry's is saying its data is and therefore needs [22] to be protected. So there was no doubt in the [23] Court's mind when it entered this order that [24] there would be trade secrets produced in this

Page 35

[1] case. And there's no doubt that the Court [2] determined that the protections afforded by the [3] existing protective order were sufficient to [4] handle production of trade secrets.

[5] And the Court even goes on in the [6] protective order to say —

[7] **SPECIAL MASTER POPPITI:** What page?

[8] **MR. SMALL:** — that the disclosure of [9] trade secrets would be competitively harmful to [10] the producing party. So all the harm that Fry's [11] talks about, the Court was aware of and [12] considered and found that the protective order [13] was sufficient to handle it.

[14] Last point, Your Honor. There's [15] always going to be a third party out there that [16] would prefer more protection from the protective [17] order. In fact, Your Honor heard many of them [18] come forward already in connection with the [19] original proceedings on the protective order [20] asking for more than they got.

[21] If Fry's, who is producing data [22] really no different from data being produced by [23] many other third parties in this case, were to [24] get a change of the protective order, then I

Page 36

[1] believe, Your Honor, that would open the flood [2] gates to other third parties producing exactly [3] the same kind of data asking for their [4] modifications to the protective order with really [5] no end in sight.

[6] And that was the whole purpose, Your [7] Honor, of the prior proceedings was to let [8] everyone come forward at once, put all their [9] objections out, argue them, and let the Court [10] make a decision about what the right protective [11] order was.

[12] Finally, you know, this notion that [13] Intel and AMD are dropping out is not the case, [14] Your Honor. Those parties can speak for [15] themselves. They're here today.

[16] But my understanding is that they [17]

have not withdrawn their subpoenas, and they [18] still seek production of Fry's data. And, in [19] fact, they seek the very data that we do, which [20] is transactional sales and purchase records of [21] Fry's.

[22] Thank you, Your Honor.

[23] **SPECIAL MASTER POPPITI:** Counsel, [24] please.

Page 37

[1] **MR. STONE:** A few comments, Your [2] Honor.

[3] First, with respect to the AMD [4] subpoena, I would submit that there are actually [5] far more differences than there are similarities. [6] And in particular, it's the type of information [7] that's being sought by the subpoena where the [8] differences are found.

[9] The AMD subpoena in points 11c and [10] 11d doesn't seek the information which is [11] particularly at issue here today, which is the [12] revenue information, the pricing information, the [13] cost information that is at the heart of Fry's [14] business, and if disclosed would cause the most [15] harm to Fry's.

[16] Beyond that, Your Honor, the reason [17] why — one reason why we argue that we need [18] additional protections under the protective order [19] is that what class plaintiffs intends to do [20] apparently is to push the burden on monitoring [21] this case to a non-party, Fry's, to make sure [22] that every submission in the case doesn't include [23] Fry's confidential information.

[24] By having some additional

Page 38

[1] protections, Fry's hopes that ultimately the [2] information would not be used either [3] inadvertently or intentionally in a harmful [4] manner.

[5] And I think that's all I have, Your [6] Honor, unless you have any further questions?

[7] **SPECIAL MASTER POPPITI:** No. Thank [8] you.

[9] Mr. Small, what I would like you to [10] do, if you're prepared to do it at this point, [11] with respect to documents that have been produced [12] by other third parties, what have you done to [13] protect the safeguards of those interests of [14] those third parties?

[15] **MR. SMALL:** Your Honor, this is Dan [16] Small for the class plaintiffs.

[17] We, of course, have read the [18] protective order that the Court has entered. We [19] are fully prepared and have fully abided by all [20] of the provisions of that protective order.

[21] The experts, whether they be [22] testifying or non-testifying experts that we [23] retain, have all been provided a

copy of the [24] protective order and have been asked to and have

Page 39

[1] signed the acknowledgement that they have read, [2] understood and will abide by the protective [3] order.

[4] There are additional procedures that [5] have been set up with respect to the review of [6] electronic data that has been produced in this [7] case which provide additional protections [8] actually beyond what is provided by the [9] protective order. So really we've done [10] everything.

[11] **SPECIAL MASTER POPPITI:** Would you [12] describe some of those? Because there is some [13] language in the order that I certainly can [14] reference if it's important to do that. There is [15] an expectation that there would have been [16] procedures established if electronic data was [17] being reviewed by in-house counsel at their [18] office.

[19] **MR. SMALL:** Yes. I'll have to [20] confess, Your Honor, I'm not as familiar maybe as [21] some others here with the provisions of the [22] E-discovery stipulation and order.

[23] But essentially my understanding is [24] that when native productions are made of

Page 40

[1] electronic documents, that the location of the [2] review has to be a secure facility. And that [3] there have to be other appropriate protections to [4] make sure that the native documents are not [5] improperly disseminated or are not reviewed [6] improperly by those who are not permitted access [7] to them.

[8] **SPECIAL MASTER POPPITI:** Thank you.

[9] **MR. SMALL:** Sure.

[10] **SPECIAL MASTER POPPITI:** Any other [11] comments?

[12] **MR. STONE:** If I could briefly be [13] heard, Your Honor?

[14] **SPECIAL MASTER POPPITI:** Please.

[15] **MR. STONE:** Counsel for class [16] plaintiffs makes note that there are experts in [17] this case. And now given the number of law firms [18] representing class plaintiffs, there are many, [19] many experts.

[20] And so one additional protection [21] that Fry's had requested is having some knowledge [22] concerning the nature of those experts. Fry's [23] does not want to have its highly confidential [24] information, its trade secret information to make

Page 41

[1] its way into the hands of an expert who's working [2] for one of Fry's direct

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

competitors. And to [3] avoid such an occurrence, in many cases, courts [4] impose some notice requirement that would then [5] give Fry's an opportunity to object.

[6] And given the current state of the [7] protective order, that does not exist. When [8] Fry's was dealing with AMD and Intel, two [9] parties, the number of experts at issue and [10] potentially in play was fairly small.

[11] Now, that number has expanded [12] exponentially and so Fry's submits that that is [13] further grounds for a modification of the [14] protective order at this time.

[15] **SPECIAL MASTER POPPITI:** Thank you.

[16] **MR. STONE:** I'll also note that it [17] seems that some parties have been satisfied by [18] the protective order. Fry's is not.

[19] But to the extent that a number of [20] them are, then it's not likely that many parties [21] will be coming back to seek modifications.

[22] **SPECIAL MASTER POPPITI:** Thank you. [23] Just give me one moment, please.

[24] I just want to take ten minutes to

Page 42

[1] look at something in the transcript to the [2] hearing and then we'll reconvene. Let's [3] reconvene by that clock at ten after, please.

[4] **MR. STONE:** Okay.

[5] (A brief recess was taken.)

[6] **SPECIAL MASTER POPPITI:** I just need [7] a few more minutes.

[8] (Following a discussion held off the [9] record.)

[10] **SPECIAL MASTER POPPITI:** Let me just [11] focus on one issue for the moment. I do want the [12] opportunity to review Judge Jordan's transcript, [13] and without sounding unreasonable, because I [14] don't want to sound unreasonable, if I can have [15] that — is close of business today doable?

[16] **MS. GRAHAM:** That's fine. We can do [17] that.

[18] **SPECIAL MASTER POPPITI:** Okay.

[19] Great.

[20] There was some reference to a need, [21] if you will, to also look at the protective order [22] insofar as utilization of confidential material [23] by — highly confidential is the way you look at [24] it as far — insofar as experts are concerned.

Page 43

[1] And I think it's fair to suggest [2] that if you look at Page 81 of my report dealing [3] with Paragraphs 6b and 11, you will

see the [4] result of the dispute as between a number of [5] third parties and what the parties wanted in the [6] case. And the dispute was framed in virtually [7] the same language that counsel framed it just a [8] short while ago.

[9] I'm looking at Page 88 of the June [10] 12th, 2006 transcript. This is Mr. Holston [11] speaking. It's H-O-L-S-T-O-N. Excuse me.

[12] This is a quote. "This relates to [13] the parties' experts and consultants." And by [14] "this relates", he's talking about Paragraph 6 — [15] 6b. "The third — the non-parties have requested [16] that they be given, in fact, who the parties are [17] intending to use as their experts and their [18] consultants in this litigation.

[19] And Your Honor, although it may not [20] be clear, let me make it clear. Obviously, [21] non-parties would be willing to be bound by [22] appropriate confidentiality around that [23] information. We don't have a dog in the fight, [24] Your Honor, but we do — it is a small world.

Page 44

[1] The technology world is small and [2] getting smaller every day. And who the parties [3] are selecting, and my guess is there's going to [4] be quite a number of experts and consultants in [5] this case, and who they're using may very well be [6] relevant to the non-parties in the context of the [7] ordinary course of their business.

[8] And in the nature of the information [9] that's going to be provided to these individuals, [10] Your Honor, we don't think this is an [11] unreasonable protection. And to take a page out [12] of AMD's book, the only concern here would be if [13] the Court were to conclude that the counsel and [14] the non-parties could get access on this [15] information and would misuse it.

[16] And, otherwise, Your Honor, there is [17] clearly a legitimate business interest for the [18] non-parties to know who's getting access to their [19] incredibly sensitive information. AMD, in [20] essence, recognizes that they are going to tell [21] us who the in-house lawyers are. [22] We think we ought to be told who the [23] experts are as well."

[24] Now, what resulted from that

Page 45

[1] discussion — let me just read the section of the [2] report. This is a quote from Page 81 into 82.

[3] The parties argued against the [4] change sought by the third parties "simply [5] because there's going to be a lot of experts, a [6] lot of consultants. Many of them are [7] non-testimonial. And both Intel and AMD view [8] that as work product and that we wouldn't, in the [9]

ordinary course, be disclosing to anyone — [10] anybody, nor would we have any obligation to do [11] so."

[12] "The parties, however, went on to [13] offer that they would be willing to accommodate [14] the third parties' concerns in the spirit of [15] compromise and agreed to work with the third [16] parties to come up with mutually acceptable [17] language."

[18] "Following the hearing, by [19] submission dated June 15th, 2006, the parties [20] agreed to revise the concluding paragraph, [21] Paragraph 11 to add the following language." And [22] then it goes on to quote the language.

[23] With that, I will suggest for the [24] record that I am not inclined to propose a change

Page 46

[1] to the protective order. At the same time, I [2] want to give counsel the opportunity to provide [3] me with the transcript from the case that you [4] referenced with Judge Jordan, so I can examine [5] that.

[6] If you think that the papers filed [7] in conjunction with that would be helpful, then [8] I'll leave it to your discretion as to whether or [9] not you want to file those papers with the [10] transcript.

[11] I don't know that there would be a [12] need, but if you want the need, you want to have [13] the opportunity to make comments on those, I'll [14] entertain that.

[15] And we should discuss that now, [16] because I realize that all time frames in going [17] forward are rather tight. So if I can have the [18] transcript and anything else that you'd like [19] to — I said tonight, but that may mean you want [20] to file something along with it.

[21] Why don't you propose a time frame, [22] please.

[23] **MR. STONE:** Could we do it by close [24] of business tomorrow, Your Honor?

Page 47

[1] **SPECIAL MASTER POPPITI:** Yes.

[2] **MR. STONE:** That would give us [3] adequate time.

[4] **SPECIAL MASTER POPPITI:** Yes.

[5] **MR. SMALL:** My suggestion, Your [6] Honor, would be for Fry's to simply identify any [7] portions of the transcript that they believe are [8] relevant. If they would limit their comments to [9] that, we would not have anything that we would [10] need to respond to.

[11] **SPECIAL MASTER POPPITI:** Do you want [12] to limit yourself at this point or do you want to [13] make some judgment as to whether you want to file [14] something in addition to the transcript?

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

[15] MR. STONE: I think we'd like to [16] reserve our right to —

[17] SPECIAL MASTER POPPITI: Okay.

[18] MR. STONE: — file something along [19] with the transcript, Your Honor.

[20] SPECIAL MASTER POPPITI: And if that [21] is done by close of business tomorrow, how long [22] would you like to have to weigh in?

[23] MR. SMALL: Two days, Your Honor, [24] please.

Page 48

[1] SPECIAL MASTER POPPITI: Okay.

[2] MR. SMALL: Thank you.

[3] SPECIAL MASTER POPPITI: Would [4] someone suggest a page limit, please, so we don't [5] wind up having submittals in the submittals?

[6] MR. STONE: I think three pages [7] would be sufficient.

[8] MR. SMALL: That would do for us as [9] well.

[10] SPECIAL MASTER POPPITI: Three pages [11] is fine. Okay.

[12] Let me just clear some of this stuff [13] up, please. Well, I guess that concludes my [14] opening comments. Didn't expect it to take this [15] long, but I think it was productive for purposes [16] of the record.

[17] Counsel, please.

[18] MR. SMALL: Thank you, Your Honor. [19] Dan Small for the class plaintiffs.

[20] SPECIAL MASTER POPPITI: Please.

[21] MR. SMALL: I want to start actually [22] by clarifying something I told the Court before [23] relating to the E-discovery stipulation. Based [24] on my conversations with colleagues during the

Page 49

[1] break, it's not clear to me that the E-discovery [2] stipulation applies to data production. And it's [3] also not clear to me that it applies to [4] third-party production.

[5] So I don't want to represent to the [6] Court that that's necessarily an additional [7] protection that would apply to Fry's today.

[8] SPECIAL MASTER POPPITI: Okay. [9] Thank you.

[10] MR. SMALL: Your Honor, the class [11] plaintiffs and the class that they seek to [12] represent are end users of the x86 microprocessor [13] that Intel manufactures. The class or the [14] proposed class purchases primarily computer [15] systems that contain Intel's microprocessor [16] chips.

[17] And we are at the end of the line of [18] distribution. We are the ones who buy for our [19] own use and not for resale.

[20] What that means for this case, Your [21] Honor, is that to prove our damages claim, it's [22] not sufficient for us just to prove, of course, [23] that Intel unlawfully monopolized the x86 market, [24] nor is it even sufficient to show that as a

Page 50

[1] result of that unlawful monopolization, Intel [2] charged inflated prices to its customers.

[3] In addition, because we stand at the [4] end of the distribution chain, we need to prove [5] that any overcharge that Intel imposed on its [6] customers was passed on down the line of [7] distribution to the end users, our proposed class [8] members.

[9] Therefore, Your Honor, we need [10] transactional data in this case, including Fry's [11] transactional data, to be able to show that [12] inflated prices paid by intermediaries in the [13] distribution chain led to higher prices those [14] intermediaries charged to the end users.

[15] That's the pass-on analysis. It [16] requires data, both as to the prices paid by [17] intermediaries and the prices charged by [18] intermediaries. That's precisely the type of [19] data that we're looking for in this case.

[20] That data is also relevant to class [21] certification, because it's often the case that a [22] defendant will oppose class certification on the [23] argument that you cannot use a class-wide [24] generalized damages formula to show impact and

Page 51

[1] damages to all segments of the market, that you [2] need to individually look at different types of [3] end users, depending on which channel of [4] distribution they purchased in to see whether [5] they were injured.

[6] SPECIAL MASTER POPPITI: Okay. And [7] if I understand the law on that issue, it is [8] something that is not settled in this case yet, [9] and counsel has not chosen to take the [10] opportunity to ask me to look at what the law [11] would be on class certification; correct?

[12] MR. SMALL: That's correct, Your [13] Honor. And I think it fits sort of into the [14] category that Your Honor pointed out before when [15] we were seeking to compel Intel to produce the [16] foreign document discovery, raising, you know, [17] issues under the FTAIA about whether we were [18] entitled to that discovery, you know, based [19] really on issues that were raised by the motion [20] to dismiss that Intel file.

[21] And Your Honor correctly pointed out [22] that those are, you know, merit issues that the [23] Court will get to in connection with the motion [24] to dis-

miss. Here, you know, ultimately the Court

Page 52

[1] will have to decide on plaintiffs' class [2] certification motion, what the law is, what the [3] standard is, what showing we have to make.

[4] Our point for now is because that [5] has not been ruled on by the Court, we need to be [6] able to get discovery now that will allow us to [7] handle the arguments that Intel may well make in [8] this case. And we certainly would not be [9] surprised to see Intel argue you have to show [10] that there is a generalized damages formula that [11] shows that Fry's customers, no differently from [12] customers of other retailers, are impacted by the [13] unlawful conduct, and that you have a formula [14] that can show the damages for all segments of the [15] market through a single formula.

[16] So that may well be the proof that [17] Intel tries to put us to.

[18] SPECIAL MASTER POPPITI: And I [19] expect that Intel is not going to take the [20] opportunity today to announce what position it is [21] going to take.

[22] MR. SMALL: I believe that's [23] correct, Your Honor. And I want to hasten to add [24] that we don't necessarily agree with how Intel

Page 53

[1] may argue class certification, but it is still [2] incumbent upon us as representatives of a [3] proposed class to accumulate all of the evidence [4] that we think would be important to handling [5] arguments that may well be made by Intel.

[6] So Your Honor, those are the reasons [7] that we need this data. And in particular, Fry's [8] data.

[9] We very carefully, at the outset of [10] the case, sat down with our economist and said, [11] We know we have to prove pass on here. What is [12] the sample that we need from intermediaries in [13] the distribution chain to be able to prove pass [14] on to the class?

[15] We understood that we could not [16] subpoena every single reseller in the country who [17] sells a computer with an Intel chip in it. It's [18] just not possible or practical.

[19] So we had to make judgments about [20] what would be an appropriate representative [21] sample of resellers. Now, we picked Fry's [22] because Fry's is actually different from many [23] retailers.

[24] Certainly different from Best Buy

Page 54

[1] and Circuit City in the sense that Fry's is a [2] computer super store. They have

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

huge retail [3] outlets that carry a very complete line of [4] computers, many more models than typically would [5] be carried by a Circuit City or a Best Buy.

[6] In fact, in its papers, Fry's points [7] out that since 2000 it has sold over 2000 [8] different computer models. And unlike many other [9] computer retailers or electronic stores that [10] include computers in their line of products, [11] Fry's also sells computer components.

[12] It's a store that the proverbial [13] computer geeks like to go to because they can [14] pick out each of the different components of a [15] computer and actually assemble their own [16] computers. And so Fry's is it's own kind of [17] retailer that we would like to see data from to [18] be able to see how the prices and what the [19] pricing strategy is to assure ourselves that we [20] can show with the single formula that Fry's [21] customers are injured no less than other [22] customers in the market.

[23] The other thing, Fry's has a [24] reputation and a practice of being an aggressive

Page 55

[1] pricer in the market. It offers, you know, [2] especially it appears on a sort of lost leader [3] basis, very low prices for computer systems. So [4] we need to be able to see whether there is any [5] issues there that have implications for a class [6] certification or proof of pass on.

[7] And it's also a very large retailer. [8] By our count, it has 33 stores in nine different [9] states. So they sell a lot of computers, as they [10] made clear in the papers that they submitted on [11] this motion.

[12] I would also finally point out that [13] really none of this is challenged by Fry's. They [14] claim that we didn't explain relevance [15] sufficiently or we haven't shown, you know, [16] enough relevance in light of their reasons for [17] not wanting to produce.

[18] But the essence of our explanation [19] for why these data are relevant and needed by the [20] plaintiffs, they have really not challenged.

[21] **SPECIAL MASTER POPPITI:** I think [22] Fry's position is that you haven't stepped up to [23] what they see to be a more significant burden [24] when you're looking for this information from

Page 56

[1] third parties.

[2] Would you speak to that, please?

[3] **MR. SMALL:** Yes. First of all, for [4] all the reasons I just articulated, Your Honor, [5] this was not a casual request on the class [6] plaintiffs' part for this data. This was part of [7] a very carefully crafted sampling of resellers [8] that, with the

assistance of our economist, we [9] put in place to get the collection of data we [10] believe we need to show pass on in this case.

[11] And the notion that we need to prove [12] pass on is not disputed, nor could it be. And [13] the notion that the right way or the right [14] collection of evidence to prove pass on is [15] purchase information and resale information by [16] the intermediaries is not disputed, nor could it [17] be. So that's why we need this information.

[18] And I would submit, while certainly [19] Fry's can make arguments that that need is [20] outweighed by certain other factors, we think, [21] first of all, that the need is great. So it [22] would take very compelling other factors to [23] outweigh it.

[24] And second, when you look closely at

Page 57

[1] what the other factors are that Fry's points to, [2] they are not substantial.

[3] And if I may, Your Honor, I'd like [4] to go through those.

[5] **SPECIAL MASTER POPPITI:** Please.

[6] **MR. SMALL:** First, Fry's argues, [7] well, you might need the data at some point, but [8] you certainly don't need it now. And for the [9] reasons I just gave, Your Honor, we certainly do [10] need it now for class certification purposes.

[11] This is an issue that is going to [12] come up, we believe, on class certification, and [13] the data is directly relevant to the issue of [14] whether we can have a generalized damages [15] formula.

[16] Second —

[17] **SPECIAL MASTER POPPITI:** Let me just [18] ask a question. It really is more out of [19] curiosity than of substance, but when the [20] original scheduling order was discussed with [21] Judge Farnan, was there any discussion of phase [22] discovery? That is, discovery for class [23] certification purposes and then discovery for [24] merits?

Page 58

[1] **MR. SMALL:** Not to my knowledge, [2] Your Honor.

[3] And I believe the reason for that is [4] because, of course, the class plaintiffs are not [5] the only plaintiffs in this case.

[6] **SPECIAL MASTER POPPITI:** Right.

[7] **MR. SMALL:** There is also AMD, which [8] of course doesn't have to face any class [9] certification issues. So AMD, which had filed [10] the case first, had served subpoenas on third [11] parties I think way back in 2005.

[12] It was anxious, as it should be, to [13] proceed in discovery, and certainly

would not [14] want to have to be bifurcated where it dealt just [15] with class certification issues, which it didn't [16] have, and had to wait further to get to the [17] merits.

[18] So AMD sort of led the charge in [19] moving into merits, and we followed along.

[20] **SPECIAL MASTER POPPITI:** And [21] notwithstanding that, it's my understanding, I [22] think, based on your submissions that you have [23] either agreed or you would agree that you will [24] accept, if you will, discovery that is more

Page 59

[1] focused for purposes of class certification. And [2] then once that is accomplished, you expect full [3] discovery without explaining any time lines; is [4] that fair or am I —

[5] **MR. SMALL:** I would say it's correct [6] to this extent, Your Honor, that the class [7] plaintiffs have focused their efforts on getting [8] production of transactional data.

[9] **SPECIAL MASTER POPPITI:** Right.

[10] **MR. SMALL:** Because that is a key [11] portion of the evidence that we need for class [12] certification purposes. But it's certainly our [13] hope that the production we get now will be the [14] production for the case, that the same data that [15] we get now will be used also for merits.

[16] **SPECIAL MASTER POPPITI:** Okay.

[17] **MR. SMALL:** Now, I will mention that [18] we offered in our papers to accept a sample from [19] Fry's of its data for class certification [20] purposes as long as Fry's would agree for merits [21] to make a full production of its data later.

[22] We don't know what Fry's position is [23] on that, but that is something we're willing to [24] discuss with Fry's.

Page 60

[1] **SPECIAL MASTER POPPITI:** Yeah. Let [2] me just make sure of that, because if you would [3] turn your attention just briefly to Page 3 of [4] your reply.

[5] **MR. SMALL:** Mm-hmm.

[6] **SPECIAL MASTER POPPITI:** Do you have [7] that in front of you?

[8] **MR. SMALL:** Yes, Your Honor.

[9] **SPECIAL MASTER POPPITI:** You [10] indicate at five, class plaintiffs are amenable [11] to receiving such a sample for class [12] certification purposes, but Fry's would then need [13] to produce the full data for merits.

[14] And at the same time in the [15] conclusion, you state that Fry's arguments of [16] class plaintiffs can wait until after class [17] certification. Note, only a

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

sample should be [18] rejected for the reasons expressed above.

[19] MR. SMALL: Yes.

[20] SPECIAL MASTER POPPITI: There is [21] some happy medium there somewhere, is there not?

[22] MR. SMALL: It's really separate [23] points. We certainly cannot wait until after [24] class certification for any production from

Page 61

[1] Fry's.

[2] SPECIAL MASTER POPPITI: I [3] understand.

[4] MR. SMALL: And ultimately, in the [5] case, we want a full production from Fry's, not [6] just a sample. The only thing we're saying in [7] the nature of a compromise is that we would take, [8] for class certification purposes, a sample if [9] Fry's agree to give us the full production later.

[10] SPECIAL MASTER POPPITI: Okay.

[11] MR. SMALL: So, Your Honor, there [12] really is no reason, even if Fry's could show [13] that the data are not necessary for class [14] certification, which we strenuously dispute, to [15] delay production any way, because AMD and Intel [16] seek the same data.

[17] And there's no reason to wait for [18] them. They don't face class certification [19] issues.

[20] Fry's also says that we haven't met [21] and conferred enough. It's probably the first [22] time I've heard that argument eight months after [23] we began meeting and conferring.

[24] We believe, based on the history of

Page 62

[1] the negotiations, Your Honor, that we would not [2] reach agreement with Fry's even through extensive [3] additional attempts at meeting and conferring, [4] because, number one, Fry's has taken its position [5] that it would not produce data absent [6] modification of the protective order. Something [7] we could not agree to.

[8] Second, just the history of the [9] negotiations shows that despite many attempts, we [10] have not made progress, at least before the [11] filing of the motion to compel with Fry's in the [12] negotiations. There's no reason to think that [13] would suddenly change.

[14] In fact, in the seven months [15] prefiling of the motion that we negotiated, we [16] never once got an offer from Fry's to produce any [17] data. Certainly none was produced.

[18] Fry's would not even agree to [19] produce the tiny sample that we had asked for [20] that would allow the parties

to identify the [21] precise fields that Fry's maintains that we [22] needed production of. So we could not get [23] cooperation from Fry's to advance the [24] negotiations really at all.

Page 63

[1] And third, since the filing of the [2] motion, we have had a discussion with Fry's about [3] what they would produce. And that proposal that [4] Fry's made to us, in our view, is wholly [5] inadequate. Really what it consists of is an [6] offer to produce one data point for each product [7] that Fry's sold during the relevant period.

[8] So for a particular computer [9] product, a particular model, or however they [10] define their different products, they would give [11] us one data point for the whole time period. Our [12] expert, who is handling the data work in the [13] case, submitted a declaration, a declaration of [14] Jonathan Orszag saying that that level of [15] aggregation, which by the way is compounded by [16] the fact that Fry's also wants to just give us a [17] sample of that data, which would necessarily [18] exclude some products, is simply not useful. We [19] can't use that for the purposes for which we need [20] to.

[21] So in our view, it's essentially an [22] offer that has no value to us. And we firmly [23] believe, Your Honor, all the meeting and [24] conferring would not get us where we need to be.

Page 64

[1] We unfortunately have to put the burden on the [2] Court to give us some assistance in moving the [3] negotiations forward.

[4] Fry's also talks about burden, but I [5] think their burden arguments rest on a couple [6] misunderstandings of what we're looking for.

[7] First of all, we do not — we are [8] not asking Fry's to change the form of the data [9] that they keep these to produce it to us. We're [10] asking them to produce to us as they keep it in [11] the ordinary course of business.

[12] Basically our request to Fry's is [13] to — for the fields we select, for the data [14] fields we select, to simply download the data in [15] those fields onto some medium that they can then [16] hand over to us.

[17] That's what we're asking for. There [18] should not be an excessive burden at all to do [19] that.

[20] Second, Fry's talks about the burden [21] of having to print out invoices that they keep in [22] electronic file invoice by invoice and then [23] having to redact customer identification [24] information from the invoices. I want to be

Page 65

[1] clear, Your Honor, we are not asking for [2] production of invoices that are going to be [3] printed out in hard copy. [4] What we're looking for is data that [5] is input into a database that reflects the [6] transactions that Fry's has engaged in, both as a [7] buyer and a seller, that we can use to do the [8] kind of analysis we want. The invoices will not [9] do that in any way that's feasible.

[10] I mean, to try and input into a [11] data — create our own database basically from [12] invoices is a Herculean task that we're not [13] asking Fry's to produce to us or that we would [14] try to undertake in this case.

[15] Now, Fry's says why should we have [16] to produce data here when you're going to get [17] some of that data from other sources?

[18] And the short answer to that, Your [19] Honor, as we've said in our papers, is that most [20] of the data is not going to be available from [21] other sources. Certainly Fry's sales of its [22] computers to customers are really only, as a [23] practical matter, available from Fry's. We can't [24] go to each customer that walks in the door of a

Page 66

[1] Fry's store and subpoena that customer to turn [2] over the receipt or whatever they may have.

[3] I mean, they're not going to [4] obviously keep data. So that's not a feasible [5] alternative.

[6] As to purchases, we probably will [7] get production of some data that overlaps at [8] least in theory with what Fry's has. But there's [9] a few things.

[10] We don't know exactly the extent of [11] the overlap. Even if there is some overlap, [12] there may be gaps in another producing party's [13] data. There may be technical difficulties with [14] another party's data.

[15] There may be other flaws in the data [16] or the data may just not be as good. It may not [17] be as granular, for instance, as Fry's data.

[18] So we can't give up on Fry's data [19] simply because of the possibility that there may [20] be data out there that overlaps. And in any [21] event, it's not a bad thing to have production of [22] data from two parties as sort of cross checks [23] against each other for issues of accuracy, and [24] quality, and things like that.

Page 67

[1] On the sample issue, I think I've [2] basically addressed that.

[3] SPECIAL MASTER POPPITI: You have.

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

[4] **MR. SMALL:** Fry's is saying don't [5] put us to the burden of producing the full data, [6] allow us to produce a sample — that issue, by [7] the way, mainly arises in the context of Fry's [8] confidentiality concerns. They're essentially [9] saying the less data we have to produce, the less [10] confidentiality concern we have.

[11] But I would submit, Your Honor, for [12] all the reasons that we discussed this morning, [13] that the protective order deals adequately, very [14] adequately with Fry's confidentiality concerns, [15] and they should have to produce the full set of [16] data, because the protective order gives them [17] adequate protection.

[18] And I would also submit, too, the [19] burden of producing a full set of data compared [20] to a sample is virtually the same. That because [21] we're dealing with electronics in a database that [22] can download onto a medium, whether they download [23] some of the data or all the data really is not [24] much different in terms of burden.

Page 68

[1] And, in fact, it may be easier just [2] to have it all downloaded rather than trying to [3] come up with a program that identifies some [4] subset of the data.

[5] And finally, to the extent Fry's is [6] complaining about the burden, we have offered [7] repeatedly to Fry's to give us a tiny sample of [8] the data which will allow us to focus the best we [9] can on the relevant fields that we have to have [10] for our purposes, and we will limit our requests [11] for production to just those fields.

[12] So if we can get any assistance from [13] Fry's in that regard, we can actually help reduce [14] the burden that they face.

[15] The only other area that I briefly [16] want to cover, Your Honor, goes to the issue of [17] relief. As you know, when we filed our original [18] opening briefs with the Court, we said just [19] simply tell Fry's it has to produce the data and [20] give it a deadline for doing so, because we [21] thought that if it had a deadline and [22] understanding that it had to produce data, the [23] parties and Fry's could sit down and negotiate [24] the details of the production.

Page 69

[1] We unfortunately have less [2] confidence in that process now, Your Honor, [3] because of the difficulty we've had post-filing [4] of our motion in getting a productive [5] conversation going to try and lead to an [6] appropriate production of data. And so we see as [7] key features of the relief that we now request [8] the following: First, make it clear to Fry's [9] that they must produce transactional

data in the [10] case.

[11] Second, Fry's should have a date [12] certain for completing the production. We [13] propose three weeks. I'm not going to say that [14] that's a date fixed in stone, but I think it [15] gives the Court a good idea of what we believe [16] the time frame is here for production.

[17] Third, Fry's should cooperate with [18] the parties to identify the fields that we [19] ultimately want production of. And that, of [20] course, involves production of a sample and [21] making available as needed Fry's IT people who [22] can explain and answer questions that we have [23] about the data sample.

[24] And third, make it clear that to the

Page 70

[1] extent the data are available — or fourth, I [2] should say, to the extent the data are available [3] in transactional form at a transactional level, [4] that they should be produced that way. If [5] they're not available at a transactional level, [6] then produce them at the level most disaggregated [7] as they exist.

[8] And one clarification in our papers, [9] Your Honor, we propose for the sample that it be [10] just for two SKUs for a two-day period. That's [11] probably sufficient, but with the clarification [12] that the SKUs have to be — they're among their [13] top selling SKUs, so we'll have enough data in [14] the sample that it will be meaningful.

[15] In other words, it's not going to be [16] sufficient if Fry's picks two SKUs that they had [17] virtually no sales of.

[18] So, Your Honor, unless —

[19] **SPECIAL MASTER POPPITI:** So I'm [20] looking at the reply with respect to the detail [21] of what you are requesting in terms of the [22] relief.

[23] **MR. SMALL:** Yes.

[24] **SPECIAL MASTER POPPITI:** You're

Page 71

[1] suggesting that number one be modified; correct?

[2] **MR. SMALL:** Yes. Just to make it [3] clear that the two SKUs that they would produce [4] the sample of would be SKUs that have a lot of [5] sales.

[6] **SPECIAL MASTER POPPITI:** Well, that [7] phrase may not ring to a number, SKUs that have a [8] lot of sales.

[9] I mean, I certainly can — were I to [10] grant the relief, I could write that language, [11] but I'm not sure how it translates.

[12] **MR. SMALL:** I could probably do [13] better than that by suggesting Your Honor that it [14] be SKUs that are among the top ten selling SKUs [15] that Fry's has.

[16] **SPECIAL MASTER POPPITI:** I would

[17] just like to note — I don't know if you want to [18] make any comments, Mr. Small, for the record, and [19] I expect it goes, to some extent, to the issue of [20] meet and confer.

[21] I am mindful of the March 12, 2007 [22] correspondence from Mr. Volin to Mr. Henri which [23] it previews your application. And what I would [24] suggest is precise detail. And it seems to me

Page 72

[1] that — well, it just does that.

[2] Do you have any comments about that [3] correspondence and what it does or does not [4] accomplish?

[5] Do you have that in front of you?

[6] **MR. SMALL:** I agree with the Court's [7] sentiment about that. I mean, throughout the [8] negotiations, it was our attempt to be clear and [9] be, you know, open and let Fry's know as best we [10] could exactly what we were looking for and what [11] our positions were on the different issues that [12] were raised in the course of the negotiations. [13] And this is a good example of the detail and the [14] effort that went into that process.

[15] **SPECIAL MASTER POPPITI:** Well, there [16] were some comments earlier in the morning in your [17] application that the subject of the subpoena was [18] somewhat of a moving target. I think that was [19] the phrase that was used.

[20] **MR. SMALL:** Yes.

[21] **SPECIAL MASTER POPPITI:** I'm mindful [22] of the fact that the focus was either tightened [23] or at least changed. Would you characterize what [24] you did as a moving target during the course of

Page 73

[1] the meet and confers? And if you don't, how [2] would you characterize what you did?

[3] **MR. SMALL:** The basic concept of [4] what we were looking for, I don't think changed. [5] We were looking for transaction level data, both [6] with respect to Fry's purchases of computer [7] systems with x86 chips and Fry's sales of those [8] same computer systems. That never changed.

[9] What did evolve in the negotiations [10] was our attempt to articulate specifically what [11] that would require Fry's to produce. And the way [12] that we came at it was to list for Fry's as best [13] we could, the fields that we thought they [14] maintain in their database that would give us the [15] necessary information.

[16] And I think the best example of [17] that, Your Honor, is the February 23rd, 2007 [18] letter from Mr. Volin to Mr. Henri which attaches [19] to it a list of the fields broken down into neat [20] categories that we were looking for, as well as [21]

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

another attachment that gave a set of look-up [22] tables to try and minimize the volume of the data [23] that Fry's would have to —

[24] **SPECIAL MASTER POPPITI:** What was

Page 74

[1] the reference again, please?

[2] **MR. SMALL:** February 23rd, 2007 [3] letter from Mr. Volin to Mr. Henri. I would say [4] that our inability to more precisely than we did, [5] and I think we did it pretty precisely, but our [6] inability to more precisely define the data that [7] we were looking for was due, I believe, to our [8] inability to get Fry's to produce the data sample [9] or to give us a data dictionary that would [10] explain exactly what the fields are.

[11] If they had taken either of those [12] steps, we could have come back with a very [13] specific type request for the fields that we [14] wanted produced. But unless they are willing to [15] share that kind of information, all we can do is [16] give them a list of the type of fields we're [17] looking for.

[18] But it's really in their corner to [19] share the data with us so we can see what the [20] fields are. They keep — or for them to figure [21] out which specific fields they have that fit [22] within the categories of fields that we set out [23] in that February 23rd letter.

[24] **SPECIAL MASTER POPPITI:** Do you have

Page 75

[1] the reference to that in your exhibits, please?

[2] **MR. SMALL:** Yes. One second, [3] please.

[4] **SPECIAL MASTER POPPITI:** Sure. [5] Thank you.

[6] **MR. SMALL:** Your Honor, the February [7] 23rd letter is attached to the Volin [8] certification, which was filed with our initial [9] letter brief as Exhibit H.

[10] **SPECIAL MASTER POPPITI:** Just give [11] me one moment to relook at that.

[12] **MR. SMALL:** Sure. Thank you.

[13] **SPECIAL MASTER POPPITI:** Thank you.

[14] **MR. SMALL:** Sure. Thank you, Your [15] Honor.

[16] **SPECIAL MASTER POPPITI:** If counsel [17] would first turn your attention to the issue of [18] meet and confer, I'd appreciate it, please.

[19] **MR. STONE:** Your Honor, with respect [20] to the meet and confer and the fact that what [21] plaintiffs have been seeking is a moving target, [22] I think

further evidence for that is the fact [23] that plaintiffs' reply requests relief that [24] wasn't requested in plaintiffs' opening brief.

Page 76

[1] Plaintiffs' reply requests additional relief that [2] plaintiffs did not initially seek.

[3] This has been an evolutionary [4] process. Fry's has certainly made a good faith [5] effort to explain to counsel for plaintiffs why [6] it was that they had problems with the subpoena [7] and what it was willing to do if agreement could [8] be reached with respect to things such as the [9] protective order.

[10] **SPECIAL MASTER POPPITI:** That's what [11] I want to ask you. I mean, is it fair to suggest [12] that absent an agreement on the protective order, [13] literally everything else was a non-start?

[14] I mean, it may have been interesting [15] to look at. It may have been interesting to [16] start to frame, but absent an agreement on the [17] protective order, you were not going to agree to [18] produce the first piece of transactional data.

[19] **MR. STONE:** I think it depends on [20] how transactional data ultimately was defined and [21] agreed to by the parties. But certainly with [22] respect to the information that class plaintiffs [23] were seeking, absent some modifications to the [24] protective order, Fry's was unwilling to produce

Page 77

[1] information.

[2] **SPECIAL MASTER POPPITI:** And in [3] light of that, don't you expect that the dialogue [4] that you did have — and I'm aware of the [5] teleconferences, I'm aware of the Email strings. [6] I'm aware of the gaps in time between certain [7] pieces, if you will, of communication.

[8] Are you suggesting that there was [9] insufficient communication with respect to [10] detail? I understand it changed.

[11] **MR. STONE:** Well, I think at the end [12] of the day, Your Honor, counsel for plaintiffs [13] did not hear what Fry's was saying about the way [14] in which Fry's maintains its data, and I can get [15] to that in a little bit.

[16] **SPECIAL MASTER POPPITI:** Yeah. I [17] want you to do that.

[18] Are you suggesting that even today [19] counsel is mistaken as to how Fry's creates its [20] data, and how Fry's accesses its data and how [21] Fry's stores its data?

[22] **MR. STONE:** I believe they are, Your [23] Honor.

[24] **SPECIAL MASTER POPPITI:** Well,

with

Page 78

[1] that said, I'm satisfied that where the premise [2] of any meet and confer was, there had to be an [3] agreement with respect to change in protective [4] order; that that premise, because it was a [5] non-starter for the class plaintiffs, that there [6] was a sufficient meet and confer before the [7] filing of the instant motion. [8] Let's proceed to the merits then, [9] please.

[10] **MR. STONE:** Thank you, Your Honor.

[11] **SPECIAL MASTER POPPITI:** Thank you.

[12] **MR. STONE:** Counsel for the [13] plaintiffs noted during his argument that Fry's [14] is different from some of the other third parties [15] from which the plaintiffs have sought data. And [16] he's right.

[17] For instance, you were just talking [18] about SKUs. Fry's doesn't use SKUs.

[19] **SPECIAL MASTER POPPITI:** Right.

[20] **MR. STONE:** Counsel for Fry's, [21] Mr. Henri, has explained that to counsel for [22] plaintiffs on a number of occasions.

[23] In the meet and confer that began in [24] December, it didn't go back eight months like

Page 79

[1] counsel for plaintiffs suggest, but there was [2] some discussion about that.

[3] Fry's is also different in that it [4] is a private company. It is not a public company [5] like a number of the other third parties from [6] which the plaintiffs seek information.

[7] As a result, Fry's does not have the [8] same disclosure requirements as the other third [9] parties, and that has been the stumbling block in [10] connection with the negotiations.

[11] It's undisputed that the information [12] that the plaintiffs seek from Fry's is trade [13] secret, and they're seeking trade secret [14] information concerning millions and millions of [15] transactions. As a result, the plaintiffs have a [16] burden of making a particularized showing that [17] the information that they seek is relevant and [18] necessary.

[19] But even if the information is [20] relevant, discovery from a nonparty should not be [21] allowed where no need is shown, or where [22] compliance is unduly burdensome, or where the [23] potential harm caused by the production outweighs [24] the benefit.

Page 80

[1] And here Fry's submits plaintiffs [2] have not met their burden, not even in connection [3] with their reply brief. For the first time they [4] submitted their

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

expert declaration of Mr. Orszag.

[5] And I probably have butchered his [6] name. I apologize.

[7] They have not made a particularized [8] showing that the information they seek is [9] necessary, particularly at the class [10] certification stage. They have not cited case [11] authority that says they need to rely on [12] imperical data to certify a class.

[13] In fact, the cases that they've [14] relied upon suggest to the contrary as we've set [15] forth in our brief.

[16] **SPECIAL MASTER POPPITI:** Well, let's [17] just talk about that for a moment. I mean, just [18] give me one moment, please.

[19] If counsel would indulge me, I'm [20] looking at Romero versus Philip Morris.

[21] **MR. STONE:** Yes, Your Honor.

[22] **SPECIAL MASTER POPPITI:** And I'm [23] mindful of the ultimate conclusion in Romero [24] versus Philip Morris. But isn't it fair to say

Page 81

[1] that what Romero versus Philip Morris did, what [2] the Court did in that case is it went through a [3] rather healthy exhaustive analysis of one [4] approach versus another?

[5] **MR. STONE:** That's correct, Your [6] Honor.

[7] **SPECIAL MASTER POPPITI:** And it came [8] up, if you will, with a decision that if I were [9] to turn to Intel right now, and I'm certainly not [10] going to do that, but if I asked Intel, do you [11] accept the Romero approach with respect to the [12] proof necessary at the stage of class [13] certification, do you think that Intel would be [14] happy with the Romero result?

[15] **MR. STONE:** I really can't speak for [16] Intel, Your Honor.

[17] **SPECIAL MASTER POPPITI:** I can't, [18] either. But it just seems to me what Romero did [19] was, certainly that Court made a decision, but [20] the decision in Romero and the decision in South [21] Dakota Microsoft antitrust litigation does not [22] bind this Court.

[23] Is that fair?

[24] **MR. STONE:** That's correct, Your

Page 82

[1] Honor. But —

[2] **SPECIAL MASTER POPPITI:** It may be [3] the better approach. It may be that this Court [4] will adopt that approach.

[5] But in my role as a special master, [6] the discovery phase of these proceedings, unless [7] there is law articulated which is either the law [8] of the case or this Court has spoken — has [9] written about the applicable law in this

case in [10] another context, in another case, looking at law [11] of the district where this action was instituted, [12] I'd have something to go by. But I don't know [13] that.

[14] At least if I do, I'm not aware of [15] it. And counsel for either side has not informed [16] me of that.

[17] Is that fair?

[18] **MR. STONE:** I believe so, Your [19] Honor. But what that highlights is that, at [20] most, what plaintiffs have shown is that they [21] might need this information.

[22] **SPECIAL MASTER POPPITI:** Well, they [23] need information. There's no question about [24] that.

Page 83

[1] And is counsel suggesting that a [2] plaintiff, insofar as a discovery is from a third [3] party, should be limited by virtue of what the [4] third party says the proof in class certification [5] should be?

[6] **MR. STONE:** In the context of [7] seeking highly confidential trade secret [8] materials where the materials need to make a [9] particularized showing that they're entitled to [10] the information, I think it's — they need to say [11] something more than we might need this [12] information.

[13] Given the potential for harm to [14] Fry's that exists, if this information is used [15] improperly, it's not enough for them to say on [16] reply in a declaration that we didn't have a [17] chance to deal with in opposition that we might [18] need this information.

[19] **SPECIAL MASTER POPPITI:** How can [20] they do that?

[21] I mean, how can they be more [22] particular than what they have been, accepting [23] their position for the moment without some [24] articulation of what the standard is in this

Page 84

[1] case, given the fact that this Court is sitting [2] in multi-district litigation?

[3] **MR. STONE:** Perhaps they can't be, [4] Your Honor, but we submit that given the record [5] that we've put in front of the Court, that [6] balancing the need for protection that Fry's must [7] have with respect to the information and the need [8] for the information that the plaintiffs have [9] demonstrated when comparing those two, and [10] weighing the respective burdens and looking at [11] whether or not plaintiffs have met their burden, [12] that in this case, you can say they don't need [13] Fry's information, particularly at the class [14] certification stage.

[15] **SPECIAL MASTER POPPITI:** Okay.

[16] You've made your point. Please.

[17] **MR. STONE:** They certainly haven't [18] articulated why it is they need data concerning [19] millions and millions of transactions at the [20] class certification stage. Fry's also is [21] different from the other third parties in this [22] case because it apparently does not maintain its [23] data in the same way that other third parties do.

[24] As we understand it, plaintiffs seek

Page 85

[1] individual transaction data for the sales of [2] computer systems. And plaintiffs' reply makes [3] clear that all they want is Fry's data as it [4] exists in the ordinary course of business.

[5] They've made that representation to [6] Fry's in connection with meet and confer [7] discussions. They've made that representation to [8] the Court in their papers. They've made that [9] representation today to the Court in open Court.

[10] Fry's has been telling plaintiffs [11] for months that it does not maintain data in the [12] format sought by plaintiffs. It does not [13] maintain data relating to individual [14] transactions.

[15] As the declarations that Fry's has [16] submitted make clear, Fry's database system [17] merchant master contains the categories of [18] information that are generally related to the [19] information plaintiffs seek. But as those [20] declarations also make clear, that information is [21] maintained in an aggregated form.

[22] So you can't extract the data from [23] that database where you can follow a purchase by [24] Fry's of a computer system and then the sale of

Page 86

[1] that computer system to an end user. [2] Instead, as I understand it, the [3] merchant master database aggregates purchase and [4] sale information by blue. So in the reply in the [5] declaration of Jonathan Orszag, plaintiffs' [6] expert suggests that the aggregate data that [7] Fry's has offered to produce and that Fry's [8] maintains, as we represented to counsel for [9] plaintiffs, is of no use to plaintiffs.

[10] And contrary to plaintiffs' expert [11] declaration suggesting that there are other [12] databases based on his knowledge of other third [13] parties, it is our understanding — my [14] understanding based on the investigation we've [15] conducted as part of our work here that there is [16] no other database that contains this information.

[17] **SPECIAL MASTER POPPITI:** You said [18] what again, please? There is no other?

[19] **MR. STONE:** That there is no other [20] database.

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

[21] **SPECIAL MASTER POPPITI:** Thank you.

[22] **MR. STONE:** So because Fry's is [23] different in that regard and class plaintiffs [24] have suggested that the aggregate information

Page 87

[1] that Fry's maintains is not of use to them, as [2] Mr. Volin I believe said in his declaration would [3] not be meaningful, Fry's submits that it should [4] not be required to produce the information [5] requested.

[6] **SPECIAL MASTER POPPITI:** Let's have [7] a little bit of a dialogue, if you will, with [8] respect to that issue, Mr. Small.

[9] **MR. SMALL:** It's a little [10] frustrating, Your Honor, that we're at the point [11] where there's a lack of understanding apparently [12] about what data Fry's has and how it maintains [13] it. That's the very reason we've been asking for [14] production of a sample or something that would [15] explain what the data are that Fry's has.

[16] In all the correspondence I've [17] reviewed in connection with the meet and confers, [18] the only thing I've ever heard is that Fry's does [19] not keep the data on a monthly basis. And [20] because we had said produce your data sufficient [21] to show your monthly sales or your monthly [22] purchases, they said they didn't keep it in that [23] form.

[24] **SPECIAL MASTER POPPITI:** This

Page 88

[1] information, then, is it fair to say is new to [2] you —

[3] **MR. SMALL:** Well, —

[4] **SPECIAL MASTER POPPITI:** — as it's [5] been described today?

[6] **MR. SMALL:** I had an off the record [7] discussion with Fry's recently which we agreed to [8] keep off the record.

[9] **SPECIAL MASTER POPPITI:** Sure.

[10] **MR. SMALL:** But I did learn [11] information relevant to this topic for the first [12] time recently, very recently. But let me just [13] try and explain, if I can, Your Honor when Fry's [14] talks about the merchant master database and says [15] that it aggregates data into some more aggregated [16] form, the question immediately that I have is [17] where's the data coming from that it aggregates?

[18] My understanding of the merchant [19] master database is that it's an interface that [20] puts together data in certain forms for purposes [21] of reports that are generated using that [22] interface. And that it is drawing the [23] information, the data from some source to [24] aggregate it and to put it together into these

Page 89

[1] reports.

[2] So the question remains is: Where's [3] he getting the data from that it aggregates? And [4] we've never gotten an answer to that question, [5] Your Honor, and I don't know the answer.

[6] **SPECIAL MASTER POPPITI:** Have you [7] asked it?

[8] **MR. SMALL:** Yeah. We've asked them. [9] In fact, in the letter that we sent to the Court [10] in which we agreed to extend their time to oppose [11] our motion to compel to April 13th, they agreed [12] to describe the data that they keep and their [13] plan for producing it.

[14] Well, they only gave their plan for [15] producing it. We got virtually no description of [16] how they keep their data, what data they have.

[17] **SPECIAL MASTER POPPITI:** I'm [18] surprised you haven't mentioned that agreement [19] earlier in this proceeding. You want to focus on [20] that for a moment?

[21] I mean, there was an agreement to do [22] what you just suggested. Are you suggesting that [23] up to this point there has been, from your [24] vantage point, no description that is sufficient

Page 90

[1] for you to understand how the data is kept?

[2] **MR. SMALL:** I can certainly answer [3] for myself that I do not understand sufficiently [4] how Fry's keeps its data. I would encourage the [5] Court to, if the Court would like to hear from [6] Mr. Volin, who participated in all the [7] discussions, I believe, with Fry's, to see if he [8] has anything to add about that.

[9] **SPECIAL MASTER POPPITI:** Well, let [10] me ask this question, and just take your chair [11] there for a minute, Mr. Small.

[12] From my perspective, how can I make [13] some judgment with respect to this application if [14] I'm being told by Fry's that this is the way we [15] understand our data system from the class [16] plaintiffs? We're not sure we understand.

[17] How can I make some judgment with [18] respect to that if I have no record on which to [19] make my own judgment with respect to data, how [20] it's kept and the fields that you're asking for?

[21] I mean, I don't think that's an [22] unfair observation to make, is it?

[23] **MR. SMALL:** I have two suggestions, [24] Your Honor. Would you like me to come up to the

Page 91

[1] podium?

[2] **SPECIAL MASTER POPPITI:** No. You [3] can stay at counsel table.

[4] **MR. SMALL:** First of all, the Court [5] could certainly direct Fry's to produce the [6] responsive data in its most disaggregated form. [7] It has it.

[8] We're not, again, asking it to [9] change the form in which it keeps its data. I [10] said that earlier.

[11] But just give it to us as [12] disaggregated as you have it. That they can [13] certainly do.

[14] You know, second, I think as an [15] alternative that we don't prefer, but if the [16] Court would like us to do, we certainly would. I [17] mean, I think we made a lot of headway today.

[18] The Court has, you know, addressed [19] some important issues that have interfered with [20] our ability, I believe, to make progress with [21] Fry's, that if we can get enough clarity from the [22] Court on the other issues besides the particular [23] scope of the production or the particular nature [24] of the data to be produced, that with

Page 92

[1] encouragement from the Court to sit down, you [2] know, earnestly and in good faith to complete the [3] negotiation about the particular data to be [4] produced, that we could do that fruitfully.

[5] **SPECIAL MASTER POPPITI:** Please.

[6] **MR. STONE:** Your Honor, to go over [7] the point about whether or not this is the first [8] time class plaintiffs are hearing about how this [9] is, how Fry's maintains its data, and Mr. Henri [10] can address this further because he actually [11] participated in discussions, but my understanding [12] is that this has been a problem from the [13] beginning.

[14] Because Fry's information is not [15] maintained in such a way that you can track [16] individual transactions. And I believe that [17] counsel for Fry's, Mr. Henri, explained that, I [18] believe, to Mr. Volin.

[19] So this is not something that's [20] brand new here at the hearing. In addition, in [21] an effort to explain that and provide the Court [22] with a record which supports that, we did submit [23] two declarations. One from a Fry's IT person who [24] described ways in which the data is maintained in

Page 93

[1] merchant master, which happens to be a [2] proprietary system as described in [3] declarations —

[4] **SPECIAL MASTER POPPITI:** Right.

[5] **MR. STONE:** — developed by Fry's. [6] So there is a record before the [7] Court on this point.

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

[8] **SPECIAL MASTER POPPITI:** And are you [9] satisfied that the record is complete on this [10] point?

[11] **MR. STONE:** I believe that the [12] record before the Court demonstrates that the [13] information that the plaintiffs were seeking that [14] Fry's has in its database is aggregated. And [15] given the declaration of plaintiffs' expert, the [16] plaintiffs' expert says that that information, if [17] it's aggregated, is of no use to them.

[18] **MR. SMALL:** Your Honor, I'm not even [19] sure we have clarity as to exactly how the data [20] at merchant master database is kept. But we [21] still don't have an answer to the question, and I [22] think it's very fundamental.

[23] Where does the merchant master [24] database get its data from that it puts into

Page 94

[1] these aggregate categories? Where is that data [2] coming from?

[3] **SPECIAL MASTER POPPITI:** Well, the [4] dilemma that I have is I'm not convinced at this [5] juncture, having read everything you've [6] submitted, that I can make a judgment on paper on [7] these papers. I mean, it seems to me that the [8] only way that I can have some degree of comfort [9] with any judgment that I would make is for there [10] to be some opportunity to have someone describe [11] under oath the data system and react to that by [12] testimony under oath. Because I'm not convinced [13] I can do it on these cold papers.

[14] Now, I understand that it is the [15] applicant's burden, but that doesn't make this [16] application go away if I'm not convinced that I [17] understand the nature of what we're looking for [18] here, and if I don't see it rising out of the [19] meet and confers. And I'm not sure that I do.

[20] So that I think I have two [21] alternatives here, a little bit different from [22] the way Mr. Small describes it.

[23] And that one of the alternatives is [24] to say you all go back to your respective places

Page 95

[1] and drill down on precisely what we're talking [2] about here and forge at least an understanding, [3] if you will, almost by stipulation that we [4] understand that this is what this system is. [5] This is what this system does. And as a result [6] of that, this is what we're asking for.

[7] And if that can't be accomplished, I [8] don't see any way I can deal with this short of [9] some hearing. Not argument, if you will.

[10] Now, you may have your witnesses [11] sitting right here. I don't know

whether you do [12] or don't.

[13] If you do, we may want to talk about [14] whether that can be done or whether you want it [15] to be done or suggest that it be done today. [16] Even if you do, you may want to be doing it in [17] short order on another day.

[18] And if you don't have your folks [19] here, then clearly we have to do it in short [20] order on another day.

[21] **MR. SMALL:** Your Honor, it seems to [22] me —

[23] **SPECIAL MASTER POPPITI:** You want to [24] discuss anything among yourselves off the record

Page 96

[1] at this point, because I'm happy to suggest that [2] you do that if you want to.

[3] **MR. STONE:** I'd certainly like to [4] have a discussion with my client, at a minimum.

[5] **SPECIAL MASTER POPPITI:** Certainly. [6] What time?

[7] **MR. STONE:** Could we say 15 minutes, [8] Your Honor?

[9] **SPECIAL MASTER POPPITI:** Is that the [10] right time? Sure.

[11] So we'll do ten minutes to 1:00 by [12] that clock or thereabouts. I think the clocks in [13] the courthouse are all the same.

[14] Okay. Thank you.

[15] **MR. STONE:** Thank you, Your Honor.

[16] (A recess was taken.)

[17] **MS. GRAHAM:** Thank you for waiting.

[18] **SPECIAL MASTER POPPITI:** Oh, not a [19] problem.

[20] **MR. STONE:** Much appreciated, Your [21] Honor.

[22] **SPECIAL MASTER POPPITI:** Thank you. [23] Please.

[24] **MR. SMALL:** Your Honor, we have

Page 97

[1] conferred with Fry's and talked among ourselves, [2] and I think there are elements of a procedure [3] that we agree with and elements that the parties [4] will present separately to Your Honor for your [5] consideration.

[6] **SPECIAL MASTER POPPITI:** I'm missing [7] some of what you're saying.

[8] **MR. SMALL:** I'm sorry.

[9] **SPECIAL MASTER POPPITI:** No, that's [10] okay. It's really dry in this room. I think [11] it's probably affecting all of us.

[12] **MR. SMALL:** We had a conversation [13] with Fry's —

[14] **SPECIAL MASTER POPPITI:** Yes.

[15] **MR. SMALL:** — in which we discussed [16] procedures going forward

with the goal of class [17] plans and presumably the other parties to the [18] litigation trying to understand exactly what the [19] data are that Fry's keeps that would be [20] responsive to our subpoenas.

[21] And the first part of the proposal [22] would be for class plaintiffs through two of [23] their — up to two of their experts and up to two [24] of their lawyers to meet informally with Fry's

Page 98

[1] who would make available to us their IT personnel [2] who have knowledge of their data to answer all [3] our relevant questions about the data that Fry's [4] keeps with the goal of hopefully permitting us to [5] fully understand what Fry's has and doesn't have [6] that's responsive to the subpoena. We propose [7] that that meeting occur within one week from [8] today.

[9] We further propose that if we do not [10] feel that we adequately understand what data [11] Fry's has based on the informal meeting, that we [12] then take, within one week after that, the 30(b)(6) [13] deposition of Fry's.

[14] So, in essence, that's what our [15] proposal is. And if —

[16] **SPECIAL MASTER POPPITI:** And by [17] proposal, does that mean that that has, in [18] substance, been agreed to?

[19] **MR. SMALL:** Only the first part, [20] Your Honor, about having the informal meeting has [21] been agreed to, but not the 30(b)(6) deposition.

[22] **SPECIAL MASTER POPPITI:** Well, you [23] were — I'm happy to hear, counsel. It sounds [24] like you were reading my notes.

Page 99

[1] **MR. SMALL:** And actually, Your [2] Honor, I did forget one part. I apologize. [3] It would be important to us before [4] the informal meeting with Fry's to receive a [5] sample of the data so that we can have a better [6] understanding of what's there to inform our [7] questions for the informal meeting.

[8] **SPECIAL MASTER POPPITI:** And you [9] discussed that as well?

[10] **MR. SMALL:** That part I'm not — I [11] think was with certain restrictions to protect [12] the confidentiality of that data sample. I think [13] Fry's, in concept, is agreeable to that.

[14] **MR. STONE:** Yeah, in concept. The [15] additional point was that whoever attends this [16] meeting on behalf of plaintiffs would sign an [17] undertaking that would have a heightened level of [18] confidentiality beyond the scope of the current [19] protective order, so that that information would [20] not be disclosed

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

at all to anyone outside of that [21] meeting.

[22] That's what Fry's would propose.

[23] MR. SMALL: And it's acceptable to [24] us.

Page 100

[1] SPECIAL MASTER POPPITI: Okay.

[2] MR. SMALL: The concept would be [3] only the lawyers and the experts at the meeting [4] would have access to the information.

[5] SPECIAL MASTER POPPITI: Okay.

[6] MR. STONE: And what we would like, [7] Your Honor, is that information not be used in [8] any subsequent proceedings before the Court, so [9] that there's not a declaration from someone from [10] class plaintiffs saying Fry's told us this and [11] then that information is disseminated here in the [12] Court, given our concerns with the protective [13] order that's currently in place.

[14] SPECIAL MASTER POPPITI: Well, let [15] me make an observation before I ask you to kind [16] of — please be comfortable.

[17] MR. STONE: Thank you.

[18] SPECIAL MASTER POPPITI: Before [19] getting into the detail of what you were [20] discussing, what I want to make sure that I do [21] from my desk is to generate the proposed findings [22] and conclusions for Judge Farnan on the issue of [23] jurisdiction and on the issue of the protective [24] order.

Page 101

[1] I'm going to suggest just on those [2] two issues, in light of what I think is going on [3] here, not later than Tuesday or Wednesday of next [4] week. I mean, I'm going to be getting what you [5] are providing to me by close of business on [6] Friday, if I remember the count as you proposed [7] the number of days that you need.

[8] I'm also going to suggest to Judge [9] Farnan, in light of the importance of the issue [10] to keep things moving forward, that he shorten [11] the time within which you would have the [12] opportunity to take exceptions to that. You, by [13] virtue of the rule, are afforded 20 days.

[14] In light of the record that you've [15] made here today, and in light of the record I [16] expect you're going to be making by Friday, I'm [17] going to propose that Judge Farnan shorten the [18] time to three days within which you would take [19] exception to whatever I order.

[20] You can expect that the [21] jurisdictional piece is essentially what I did in [22] the courtroom today with some flesh on the bones [23] in terms of case

citations so that that record is [24] before Judge Farnan. And with respect to the

Page 102

[1] protective order, if I don't accept the approach [2] Judge Jordan took, not suggesting I'm not going [3] to look at it and not give it serious [4] consideration and perhaps may even accept it. [5] But if I don't, you can expect that the order and [6] the rationale for it is going to be substantially [7] what I did in the courtroom today.

[8] So I believe that the suggestion to [9] Judge Farnan to shorten the time to three days [10] gives you more than adequate time. I would do [11] that from my desk, but I don't believe I have [12] that authority under the rule.

[13] It seems to me that the rule which [14] enables the Court to appoint a special master [15] lays out some of the responsibilities of the [16] special master in that rule, and then calls out [17] the 20 days and says unless it is otherwise [18] shortened by the Court or words to that effect.

[19] I don't believe that I have that [20] authority, even though I know I have the [21] authority to issue orders. I know I have the [22] authority to issue findings, recommendations, et [23] cetera. But I don't believe I have the authority [24] to impact on that rule.

Page 103

[1] I will have some ex parte [2] communication as contemplated by the order that [3] appointed me with Judge Farnan only on the issue [4] of shortening the time within which to take [5] exceptions. And I anticipate I'll have that in [6] due course.

[7] If he believes or if he concludes [8] that I have the authority to shorten that time, [9] then you can expect that the time will be [10] shortened to three days. And the reason why I'm [11] doing that is because it seems to me it's [12] critically important to keep this issue on track [13] for ultimate decision, one way or the other.

[14] Now, let's get back to what I think [15] I heard part of, and I'm happy to listen to the [16] rest of it. I understand that there will be a [17] meet and confer informal. I understand that that [18] will involve some of your technical folks.

[19] And I understand that it will [20] involve some of your technical folks and [21] attorneys. I don't know whether those [22] individuals are going to be pre-identified prior [23] to the meeting. I expect that that would make [24] sense to do that in a document, if you will,

Page 104

[1] memorializing what you've done here.

[2] I also understand that what is — [3] what is — if this is agreeable, what is learned [4] during the course of that meeting is not going to [5] form the basis for any information ultimately [6] provided to the Court. I'm not sure I understand [7] that, because it seems to me if things fall [8] apart, at some point I'm going to have to be back [9] involved. And ultimately, I'm going to want to [10] know what this data is, and how it's kept, and et [11] cetera.

[12] MR. SMALL: Your Honor, I think [13] there are two situations where we would need to [14] be able to communicate to the Court what it is [15] that we learned during this informal meeting with [16] Fry's. One, is if we determine that the informal [17] meeting is not successful, that it doesn't give [18] us an adequate understanding of Fry's data, and [19] we come to the Court, unless the Court is [20] prepared now to put this in place and say we want [21] to take a deposition, I think we need to be able [22] to tell the Court why. You know, what it was [23] about, what we learned and didn't learn that [24] requires a deposition.

Page 105

[1] And then, second, you know if we get [2] to the point where we take a deposition, and [3] we're coming back to the Court, or even if we [4] don't take a deposition, but we are coming back [5] to the Court for further proceedings on our [6] motion to compel, we may — it will be, I think, [7] critical for us to be able to explain to the [8] Court what the data are that we're trying to [9] compel.

[10] SPECIAL MASTER POPPITI: Well, let [11] me make an observation before I hear what your [12] understanding or what agreement you may choose to [13] forge. [14] I, in fact, contemplated setting up [15] a process, not unlike what you have just [16] described, to include the opportunity for a [17] deposition. Now, whether or not it makes sense [18] to schedule that, if you will, in terms of time [19] frame, or whether it makes sense to go through [20] the meet and confer within the time frame you [21] describe, if it doesn't work to get back to me, [22] and have some discussion about whether a 30(b)(6) [23] goes forward. I just don't want to be wasting [24] your resources, and by virtue of you using my

Page 106

[1] resources, spending your resources. [2] So, if it's — if it is a matter of [3] a two-step, so long as the two-step proposes a [4] very short time frame, then I'll do a two-step. [5] I like to dance.

[6] MR. STONE: On the two-step point — [7] SPECIAL MASTER POPPITI: Just [8]

**Phil Paul v.
Intel Corporation**

**Hearing
May 1, 2007**

kidding. I said I like to dance. I'm sorry.

[9] **MR. STONE:** I would propose that we [10] do it that way. And that within 24 hours of the [11] meeting out in California, we report back to you [12] with either this issue is now resolved —

[13] **SPECIAL MASTER POPPITI:** Or isn't.

[14] **MR. STONE:** — or isn't. And then we [15] see what the step is, because it could well be [16] that we have a fruitful discussion.

[17] **SPECIAL MASTER POPPITI:** Right.

[18] **MR. STONE:** And it makes sense to [19] have another discussion —

[20] **SPECIAL MASTER POPPITI:** Right.

[21] **MR. STONE:** — rather than going to [22] something like a deposition.

[23] **SPECIAL MASTER POPPITI:** I'm [24] amenable to doing it in that fashion. What I'd

Page 107

[1] like you all to do if you wouldn't mind is lay [2] this out with dates certain and dates certain to [3] include me at the end of that meet and confer, if [4] you wouldn't mind making the call to my office [5] sometime this afternoon and checking with Mary [6] Levant to see what my availability could be [7] consistent with what I know I would like to see. [8] And that is expedited.

[9] **MR. STONE:** And if I may, Your [10] Honor —

[11] **SPECIAL MASTER POPPITI:** And also [12] weave into that document, if you will, the [13] discussion about confidentiality, heightened [14] confidentiality that you will be making in this [15] for purposes of doing this business.

[16] **MR. STONE:** Given that some of us [17] are traveling back to the West Coast today, would [18] it be okay if we were to get back to you by close [19] of business tomorrow?

[20] **SPECIAL MASTER POPPITI:** Absolutely.

[21] **MR. STONE:** Thank you, Your Honor.

[22] **SPECIAL MASTER POPPITI:** Yes.

[23] **MR. SMALL:** And I just want to be [24] clear, Your Honor, that this schedule we're going

Page 108

[1] to put in place will include production of the [2] sample data by Fry's.

[3] **MR. STONE:** I mean, conceptually, [4] although, Mr. Henri needs to speak to some people [5] at Fry's before we can actually agree to that in [6] advance.

[7] **SPECIAL MASTER POPPITI:** Well, let [8] me ask this question, because I expect I have the [9] authority to order it, and you've got the right [10] to take exception to it, which puts us all in a [11] balloon of

stall, if you will. And I don't mean [12] to suggest that's not appropriate.

[13] That's what the rules contemplate.

[14] That's the authority that I have.

[15] I'm inclined to expect that making a [16] sample makes sense particularly in the context of [17] your having forged an agreement with respect to [18] the utilization of that information. And the [19] expectation that your agreement, even though it [20] is different from the protective order, I will [21] sign it as an order and expect full compliance [22] with that order.

[23] And if there isn't, I understand the [24] work that — the very important work this Court

Page 109

[1] does, all the time dealing with highly [2] confidential information. And I know from [3] conversations I've had with Judge Farnan and with [4] other judges of the Court that they take it very [5] seriously. And I can assure you that if there's [6] a violation of any confidence, that I will deal [7] with it as severely as I think I should.

[8] **MR. STONE:** I appreciate your [9] comments, Your Honor. Given that there's some [10] additional people at Fry's who would have to make [11] this decision, I'm not in a position to do that.

[12] **SPECIAL MASTER POPPITI:** I respect [13] that.

[14] **MR. STONE:** But it's something we [15] can address in our correspondence with you [16] tomorrow.

[17] **SPECIAL MASTER POPPITI:** Okay. And [18] your colleagues, your clients can expect that if [19] there is no agreement with respect to a sample, [20] that I am inclined to order one.

[21] So to the extent it should be [22] described, then you should describe it in the [23] context of serving up to me your agreement, which [24] I will order. And in the context of saying we

Page 110

[1] have not been able to agree to this, this is what [2] we'd like to see. This is what we'd like not to [3] see.

[4] Please.

[5] **MS. GRAHAM:** Your Honor, I just [6] wanted to address the issue of the parameters on [7] this meeting. And I got the sense that Your [8] Honor was not clear about why we might be asking [9] to have the meeting off the record, if you will.

[10] And I wanted to just make the point, [11] and it relates a little bit to this two-step — [12] one step, as Your Honor pointed out, if we get to [13] a point where there's a step that's an [14] affirmative order, and if it implicates our [15]

concerns with respect to confidentiality and also [16] relevance, then we're faced with having to make a [17] choice of whether to appeal that. And as you [18] said, there's the stall concern.

[19] **SPECIAL MASTER POPPITI:** It's built [20] in. Sure.

[21] **MS. GRAHAM:** Yeah. It's just built [22] in.

[23] So the point of having this meeting [24] was really in our interest — and I think both

Page 111

[1] sides maybe proposed it, but we certainly did — [2] was two-fold. One relates to having something [3] productive and the other relates to protecting [4] our concerns.

[5] So, I mean, we all know if we give a [6] deposition, that will be subject to the rules of [7] a deposition. And often it's just harder to have [8] the kind of give and take and really get down to [9] really what you can understand.

[10] When we were talking while Your [11] Honor was waiting for us, I mean, we each had [12] questions of the other of, you know, what is it [13] you're looking for, because we don't get that. [14] And, you know, you can ask those questions.

[15] In a deposition, you're not going to [16] have that. So they would get their shot at [17] making whatever record they could. And, [18] obviously, we're not going to be interested in [19] helping them make a record.

[20] **SPECIAL MASTER POPPITI:** I [21] understand that.

[22] **MS. GRAHAM:** And so that — so my [23] experience, if you have something that's, you [24] know, more like a real meeting between real

Page 112

[1] people, it can be productive. And I would hope [2] this is productive.

[3] And then, of course, the other [4] reason is simply that if we have an order now [5] that as I mentioned implicates our concerns, then [6] you know, we have to decide whether or not to [7] appeal that. So if it were subject either to [8] confidentiality issues that are — you know, that [9] don't have the protections that Fry's thinks it [10] should have, and also ordering us to give [11] information that we think is not relevant, you [12] know, we have to decide, for example, whether [13] under, you know, trade secret law we really want [14] to pursue that.

[15] So that was the reasoning for our [16] wanting to have this meeting.

[17] **SPECIAL MASTER POPPITI:** Informal.

[18] **MS. GRAHAM:** Off the record meet-

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

ing.

[19] **SPECIAL MASTER POPPITI:** Well, and I [20] understand the concerns. And it seems to me, [21] correct me if I'm mistaken, please, I would [22] prefer that the opportunity is full, fair and [23] open. And if there's an expectation that [24] something coming out of that meeting literally

Page 113

[1] comes back to help in the same form and that [2] chills the opportunity to, in good faith, meet [3] and confer that, I'm not wanting to do that.

[4] At the same time, if it falls apart, [5] then it seems to me what is likely to occur is [6] the record then gets made through a 30(b)(6) [7] deposition. So you have it, but you have it [8] later in a different context.

[9] **SPECIAL MASTER POPPITI:** And I [10] realize that may not be the most efficient, but [11] what I'm not wanting to do is have to — I don't [12] want to have to measure the good faith in terms [13] of what goes on during that meeting or meeting to [14] follow by virtue of having to literally eavesdrop [15] later on in that meeting process.

[16] And if stepping back from that, [17] saying you can't use anything in that meeting to [18] come back to me, other than the fact that it [19] failed and you've got to come back and gather [20] that same information, if you will, on the record [21] with a 30(b)(6), I'll stand aside.

[22] **MR. SMALL:** Your Honor, we can [23] handle it that way. Remember, the purpose of the [24] meeting is for us to understand what data Fry's

Page 114

[1] has.

[2] And so I think there's one or two [3] outcomes of that meeting. One, we understand [4] Fry's data, in which case most likely we're going [5] to ask for whatever they have available to be [6] produced.

[7] You know, unless they convince — I [8] suppose it's possible that it's totally [9] valueless —

[10] **SPECIAL MASTER POPPITI:** Right.

[11] **MR. SMALL:** — or we don't understand [12] it, in which case we'll need to take a [13] deposition.

[14] **SPECIAL MASTER POPPITI:** I [15] understand.

[16] **MR. SMALL:** Now, if it's the former, [17] then how do we get back to the Court and say, [18] okay, we now understand this is what Fry's data [19] is? We want the following to be produced.

[20] And so really what I think it means [21] is — it's okay, but I think what it means is [22] that we would have to do a 30(b)(6) deposition [23] after this meeting which

we can do. I would just [24] suggest if we're going to have to do it, let's

Page 115

[1] set up a time right now for that to happen.

[2] **SPECIAL MASTER POPPITI:** Well, I [3] think that what I'm hearing is that that's what [4] Fry's is proposing, and I don't want in any [5] fashion to chill that meet and confer. So it [6] will have to be a two step, if you will.

[7] At the same time, and even though [8] you may not need the date, I will require that [9] you set at least parameters, outside dates for [10] deposition.

[11] Okay.

[12] **MR. SMALL:** Thank you.

[13] **SPECIAL MASTER POPPITI:** So I'll be [14] looking for a form of order when? Close of [15] business tomorrow?

[16] **MR. STONE:** Yes, Your Honor.

[17] **MR. SMALL:** Yes.

[18] **SPECIAL MASTER POPPITI:** Okay.

[19] Good.

[20] Any other matters then for today [21] please?

[22] **MR. SMALL:** Not for the class, Your [23] Honor.

[24] **MS. GRAHAM:** Your Honor, there is

Page 116

[1] one matter. When Mr. Small initially spoke this [2] morning, he revealed certain data from one of the [3] declarations that we had put under seal, data [4] about Fry's sales.

[5] And so we would ask to — we'd like [6] to have that information redacted from the [7] transcript, at least the public version of the [8] transcript.

[9] **SPECIAL MASTER POPPITI:** Mr. Small.

[10] **MR. SMALL:** No objection, Your [11] Honor, as long as there is a version that's [12] complete that the parties can use.

[13] **MS. GRAHAM:** I think it was only two [14] sentences or so.

[15] **SPECIAL MASTER POPPITI:** I will [16] leave it to you to talk about what several [17] sentences are involved, and therefore, leave it [18] to you to propose the redacted version of the [19] transcript before lodging the transcript.

[20] **MS. GRAHAM:** Sure.

[21] **MR. SMALL:** Thank you.

[22] **SPECIAL MASTER POPPITI:** And the [23] transcript would be available when, please?

[24] **THE REPORTER:** Tomorrow.

Page 117

[1] **SPECIAL MASTER POPPITI:**

Tomorrow. [2] Thank you. Thank you, all.

[3] (Hearing was concluded at 1:50 p.m.)

Page 118

State of Delaware
New Castle County

CERTIFICATE OF REPORTER
I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 118 inclusive, is a true and accurate transcript of my stenographic notes taken on May 1, 2007, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 2nd day of May, 2007, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS

Lawyer's Notes

**Phil Paul v.
Intel Corporation****Hearing
May 1, 2007**

<p>1</p> <p>1064 7:15 1066 7:22; 8:6 11 26:2; 43:3; 45:21 11c 37:9 11d 37:10 12 20:12; 71:21 12th 11:2, 5; 43:10 13th 89:11 1407 8:22 1407(b 8:2 15 96:7 15th 45:19 19 12:9; 19:13 19th 10:19; 12:23 1:00 96:11 1:50 117:3</p>	<p>6b 43:3, 15 6c 12:15; 13:4; 14:13</p> <p>8</p> <p>81 43:2; 45:2 82 45:2 83 8:19 88 43:9</p> <p>9</p> <p>90 8:19</p> <p>A</p> <p>Abbott 28:12, 19; 29:8 Abbott's 28:16 abide 39:2 abided 38:19 ability 13:12; 91:20 able 50:11; 52:6; 53:13; 54:18; 55:4; 104:14, 21; 105:7; 110:1 above 60:18 absent 62:5; 76:12, 16, 23 Absolutely 107:20 abstract 22:2 accept 12:24; 58:24; 59:18; 81:11; 102:1, 4 acceptable 45:16; 99:23 accepted 15:2 accepting 83:22 access 14:2; 21:8, 10; 23:12; 40:6; 44:14, 18; 100:4 accesses 77:20 accommodate 45:13 accomplish 72:4 accomplished 59:2; 95:7 accumulate 53:3 accuracy 66:23 acknowledged 7:23 acknowledgement 39:1 act 8:23 action 82:11 actions 7:21 actual 10:12 actually 19:7; 30:6; 37:4; 39:8; 48:21; 53:22; 54:15; 68:13; 92:10; 99:1; 108:5 add 45:21; 52:23; 90:8 added 13:16 addition 23:8; 47:14; 50:3; 92:20 additional 37:18, 24; 39:4, 7; 40:20; 49:6; 62:3; 76:1; 99:15; 109:10 address 5:6; 92:10;</p>	<p>109:15; 110:6 addressed 7:24; 16:19; 67:2; 91:18 addresses 26:1 adequate 47:3; 67:17; 102:10; 104:18 adequately 67:13, 14; 98:10 adjudicate 8:12 adopt 8:16; 82:4 adopted 14:5, 16; 15:13 advance 6:16; 10:14; 62:23; 108:6 advanced 11:16 advantage 20:2 advised 25:4 affecting 97:11 affirmative 110:14 afforded 35:2; 101:13 afternoon 107:5 again 4:18; 20:13; 74:1; 86:18; 91:8 against 10:1; 28:12; 45:3; 66:23 aggregate 32:15; 86:6, 24; 88:24; 94:1 aggregated 85:21; 88:15; 93:14, 17 aggregates 86:3; 88:15, 17; 89:3 aggregating 32:17 aggregation 63:15 aggressive 54:24 ago 43:8 agree 30:13; 52:24; 58:23; 59:20; 61:9; 62:7, 18; 72:6; 76:17; 97:3; 108:5; 110:1 agreeable 99:13; 104:3 agreed 18:12; 45:15, 20; 58:23; 76:21; 88:7; 89:10, 11; 98:18, 21 agreement 62:2; 76:7, 12, 16; 78:3; 89:18, 21; 105:12; 108:17, 19; 109:19, 23 agreements 13:9, 13; 33:9 allow 52:6; 62:20; 67:6; 68:8 allowed 29:7; 79:21 allowing 13:6 allows 14:9 almost 95:3 along 10:15, 20; 29:13; 30:12; 46:20; 47:18; 58:19 alternative 13:20, 21; 66:5; 91:15 alternatives 12:23; 94:21, 23 although 30:24; 43:19; 108:4 always 35:15 AMD 4:1; 15:10; 17:1;</p>	<p>20:21; 22:16; 23:10, 17; 24:14; 25:5, 8, 14; 26:1; 31:8, 18; 36:13; 37:3, 9; 41:8; 44:19; 45:7; 58:7, 9, 18; 61:15 AMD's 15:12; 44:12 amenable 60:10; 106:24 among 17:8; 22:1; 70:12; 71:14; 95:24; 97:1 analysis 50:15; 65:8; 81:3 and/or 23:10 Anderson 4:15 Angeles 4:3 announce 52:20 anticipate 6:20; 103:5 anticipated 33:12, 14, 15, 19 antitrust 8:18; 28:9; 81:21 anxious 58:12 apart 104:8; 113:4 apologize 6:14, 18; 25:3, 12; 80:6; 99:2 apparent 20:24 apparently 37:20; 84:22; 87:11 appeal 110:17; 112:7 appear 11:14 appeared 17:19 appears 55:2 applicable 82:9 applicant's 94:15 application 3:3; 5:16; 6:1, 22; 9:11; 16:3; 24:19; 71:23; 72:17; 90:13; 94:16 applies 49:2, 3 apply 49:7 appoint 102:14 appointed 103:3 appreciate 75:18; 109:8 appreciated 96:20 approach 8:15; 9:8; 12:20, 24; 81:4, 11; 82:3, 4; 102:1 appropriate 5:13; 40:3; 43:22; 53:20; 69:6; 108:12 April 89:11 area 68:15 argue 18:8; 31:19; 36:9; 37:17; 52:9; 53:1 argued 12:20; 45:3 argues 13:10; 57:6 arguing 4:23 argument 50:23; 61:22; 78:13; 95:9 arguments 11:15; 52:7; 53:5; 56:19; 60:15; 64:5 arises 67:7 around 16:18; 43:22 articulate 73:10 articulated 30:18; 56:4; 82:7; 84:18</p>	<p>articulation 83:24 aside 113:21 assemble 54:15 assistance 56:8; 64:2; 68:12 associate 3:21 assume 27:23 assure 54:19; 109:5 ATHEY 3:10, 11, 14, 15, 19 attached 24:15, 20; 75:7 attaches 73:18 attachment 73:21 attempt 72:8; 73:10 attempts 62:3, 9 attends 99:15 attention 25:21; 60:3; 75:17 attorneys 103:21 authority 7:7; 8:10; 9:10; 80:11; 102:12, 20, 21, 22, 23; 103:8; 108:9, 14 availability 107:6 available 65:20, 23; 69:21; 70:1, 2, 5; 98:1; 114:5; 116:23 avoid 41:3 aware 16:20; 17:21; 18:18, 19; 27:11; 28:2, 7, 8; 31:19; 34:6; 35:11; 77:4, 5, 6; 82:14 away 94:16</p> <p>B</p> <p>b 8:22 back 6:21; 17:2, 15; 21:19; 41:21; 58:11; 74:12; 78:24; 94:24; 103:14; 104:8; 105:3, 4, 21; 106:11; 107:17, 18; 113:1, 16, 18, 19; 114:17 backdrop 10:2; 15:16 bad 66:21 balancing 84:6 balloon 108:11 ban 14:21, 24 based 31:17; 48:23; 51:18; 58:22; 61:24; 86:12, 14; 98:11 basic 73:3 Basically 64:12; 65:11; 67:2 basis 31:12, 16; 32:1, 2, 7, 11, 13; 55:3; 87:19; 104:5 became 20:24 befalling 27:15 began 20:17; 61:23; 78:23 beginning 92:13 behalf 4:15, 20, 23; 8:23; 99:16</p>
---	---	--	--	--

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

behind 26:23
believes 103:7
bell 27:2
benefit 79:24
besides 91:22
Best 12:17; 53:24; 54:5;
68:8; 72:9; 73:12, 16
better 8:15; 9:7; 22:8;
71:13; 82:3; 99:5
Beyond 37:16; 39:8;
99:18
bifurcated 58:14
bind 81:22
Bingham 4:16
bit 77:15; 87:7; 94:21;
110:11
block 79:9
blue 86:4
bones 101:22
book 44:12
both 5:3; 7:10; 19:18;
31:12, 13; 45:7; 50:16;
65:6; 73:5; 110:24
bound 43:21
brand 92:20
break 49:1
Brent 3:19
Brian 5:1
brief 6:9; 42:5; 75:9, 24;
80:3, 15
briefly 40:12; 60:3; 68:15
briefs 68:18
bring 23:21
broken 31:13; 73:19
built 110:19, 21
burden 32:17; 37:20;
55:23; 64:1, 4, 5, 18, 20;
67:5, 19, 24; 68:6, 14;
79:16; 80:2; 84:11; 94:15
burdens 84:10
burdensome 32:5; 79:22
business 5:20; 14:1;
32:8; 37:14; 42:15; 44:7;
17; 46:24; 47:21; 64:11;
85:4; 101:5; 107:15, 19;
115:15
business-type 29:3
butchered 80:5
Buy 12:18; 49:18; 53:24;
54:5
buyer 65:7

C

c 26:3
California 7:4, 15; 106:11
call 107:4
calls 102:16
came 28:5; 29:13; 73:12;
81:7
can 6:5; 21:18; 22:17;
25:22; 33:24; 36:14;
39:13; 42:14, 16; 46:4, 17;

52:14; 54:13, 20; 56:19;
57:14; 60:16; 64:15; 65:7;
67:22; 68:9, 12, 13; 69:22;
71:9; 74:15, 19; 77:14;
83:19, 21; 84:12; 85:23;
88:13; 90:2, 12, 17; 91:3;
12, 21; 92:10, 15; 94:6, 8,
13; 95:8, 14; 99:5; 101:20;
102:5; 103:9; 108:5;
109:5, 15, 18; 111:9, 14;
112:1; 113:22; 114:23;
116:12
candor 18:11
careful 16:9
carefully 53:9; 56:7
carried 54:5
carry 54:3
case 5:4; 6:18; 7:1, 3, 4,
13, 15, 21; 8:10, 17; 9:24;
10:5; 16:13, 16; 18:1, 20;
19:10, 21; 21:14; 22:20;
22; 28:8, 9, 13, 16; 29:16;
30:7, 9, 10, 13; 33:6, 18,
20; 35:1, 23; 36:13; 37:21,
22; 39:7; 40:17; 43:6; 44:5;
46:3; 49:20; 50:10, 19, 21;
51:8; 52:8; 53:10; 56:10;
58:5, 10; 59:14; 61:5;
63:13; 65:14; 69:10;
80:10; 81:2; 82:8, 9, 10;
84:1, 12, 22; 101:23;
114:4, 12
cases 8:23; 41:3; 80:13
casual 56:5
categories 34:7; 73:20;
74:22; 85:17; 94:1
category 29:19; 51:14
cause 37:14
caused 79:23
certain 28:23; 31:13;
56:20; 69:12; 77:6; 88:20;
99:11; 107:2, 2; 116:2
certainly 11:19; 16:12;
23:24; 29:14; 30:9, 18;
39:13; 52:8; 53:24; 56:18;
57:8, 9; 58:13; 59:12;
60:23; 62:17; 65:21; 71:9;
76:4, 21; 81:9, 19; 84:17;
90:2; 91:5, 13, 16; 96:3, 5;
111:1
certification 50:21, 22;
51:11; 52:2; 53:1; 55:6;
57:10, 12, 23; 58:9, 15;
59:1, 12, 19; 60:12, 17, 24;
61:8, 14, 18; 75:8; 80:10;
81:13; 83:4; 84:14, 20
certify 80:12
cetera 102:23; 104:11
chain 50:4, 13; 53:13
chair 90:10
challenged 55:13, 20
chance 83:17
Chancery 7:5
change 26:13; 35:24;
45:4, 24; 62:13; 64:8; 78:3;
91:9
changed 16:22; 17:5;

19:7, 17; 72:23; 73:4, 8;
77:10
channel 51:3
characterize 72:23; 73:2
charge 58:18
charged 50:2, 14, 17
checking 107:5
checks 66:22
chill 115:5
chills 113:2
chip 53:17
chips 49:16; 73:7
choice 110:17
choose 11:14; 105:12
chosen 51:9
Circuit 8:16, 19; 9:6;
54:1, 5
circumstances 16:21;
17:4; 26:13; 28:3
citations 101:23
cited 18:20; 80:10
cites 7:1
City 54:1, 5
claim 49:21; 55:14
clarification 70:8, 11
clarifying 48:22
clarity 91:21; 93:19
class 3:3; 7:10; 9:17;
15:21; 19:15, 16; 20:16,
20; 21:4; 23:5, 11; 26:12;
31:10, 18; 37:19; 38:16;
40:15, 18; 48:19; 49:10,
11, 13, 14; 50:7, 20, 22;
51:11; 52:1; 53:1, 3, 14;
55:5; 56:5; 57:10, 12, 22;
58:4, 8, 15; 59:1, 6, 11, 19;
60:10, 11, 16, 16, 24; 61:8,
13, 18; 76:22; 78:5; 80:9,
12; 81:12; 83:4; 84:13, 20;
86:23; 90:15; 92:8; 97:16,
22; 100:10; 115:22
class-wide 50:23
clause 34:16
clauses 21:7
Clayton 3:11
clear 11:18, 19; 30:5;
43:20, 20; 48:12; 49:1, 3;
55:10; 65:1; 69:8, 24; 71:3;
72:8; 85:3, 16, 20; 107:24;
110:8
clearly 33:12; 44:17;
95:19
client 28:20, 21; 96:4
clients 109:18
clock 42:3; 96:12
clocks 96:12
close 42:15; 46:23;
47:21; 101:5; 107:18;
115:14
closely 56:24
Co 7:2
co-counsel 3:16
Coast 107:17
Cohen 3:19

cold 94:13
colleagues 48:24;
109:18
collection 56:9, 14
comfort 94:8
comfortable 100:16
coming 41:21; 88:17;
94:2; 105:3, 4; 112:24
comments 10:17, 22, 23;
11:9, 17, 21; 12:3, 14, 17;
13:3; 14:20; 18:8, 23; 19:8,
11; 29:24; 37:1; 40:11;
46:13; 47:8; 48:14; 71:18;
72:2, 16; 109:9
commercial 34:19
common 27:9
communicate 104:14
communication 77:7, 9;
103:2
company 29:1; 79:4, 4
compare 31:8
compared 67:19
comparing 84:9
compel 3:3; 20:24; 51:15;
62:11; 89:11; 105:6, 9
compelling 56:22
competitive 13:12; 20:2
competitively 34:14;
35:9
competitors 41:2
complaining 68:6
complete 54:3; 92:2;
93:9; 116:12
completing 69:12
compliance 79:22;
108:21
components 54:11, 14
compounded 63:15
compromise 45:15; 61:7
computer 31:14, 15;
49:14; 53:17; 54:2, 8, 9,
11, 13, 15; 55:3; 63:8;
73:6, 8; 85:2, 24; 86:1
computers 54:4, 10, 16;
55:9; 65:22
concept 73:3; 99:13, 14;
100:2
conceptually 108:3
concern 16:19; 44:12;
67:10; 110:18
concerned 42:24
concerning 34:3, 5;
40:22; 79:14; 84:18
concerns 16:14, 17;
45:14; 67:8, 14; 100:12;
110:15; 111:4; 112:5, 20
conclude 5:23; 9:5, 7, 9;
44:13
concluded 8:1; 117:3
concludes 48:13; 103:7
concluding 45:20
conclusion 60:15; 80:23
conclusions 100:22
concrete 18:5, 7

conduct 5:21; 7:20; 9:4;
11:20; 52:13
conducted 11:1; 86:15
conducting 9:2; 11:4
confer 20:17; 71:20;
75:18, 20; 78:2, 6, 23;
85:6; 103:17; 105:20;
107:3; 113:3; 115:5
conferred 61:21; 97:1
conferring 61:23; 62:3;
63:24
confers 73:1; 87:17;
94:19
confess 39:20
confidence 69:2; 109:6
confidential 13:8, 17, 24;
14:10; 19:20; 21:10; 22:7;
29:2; 33:8, 20; 34:1; 37:23;
40:23; 42:22, 23; 83:7;
109:2
confidentiality 33:18;
43:22; 67:8, 10, 14; 99:12,
18; 107:13, 14; 110:15;
112:8
conjunction 46:7
connection 8:13; 16:15;
35:18; 51:23; 79:10; 80:2;
85:6; 87:17
consider 5:18; 22:9
consideration 6:5;
16:10; 97:5; 102:4
considered 11:22;
21:22; 35:12
considering 23:9
consistent 10:23; 107:7
consists 63:5
consolidated 9:3
constitute 34:19
constructed 18:1
consultants 43:13, 18;
44:4; 45:6
contain 34:19; 49:15
contains 85:17; 86:16
contemplate 108:13
contemplated 103:2;
105:14
contemplates 21:8
contests 5:17
context 44:6; 67:7; 82:10;
83:6; 108:16; 109:23, 24;
113:8
continue 11:11
contrary 80:14; 86:10
controversy 30:10
convenience 24:14
conversation 69:5;
97:12
conversations 48:24;
109:3
convince 114:7
convinced 94:4, 12, 16
cooperate 69:17
cooperation 62:23
coordinated 9:3

**Phil Paul v.
Intel Corporation****Hearing
May 1, 2007**

coordinating 7:18
copies 24:3
copy 23:16; 24:1, 1;
38:23; 65:3
corner 74:18
correctly 51:21
correspondence 71:22;
72:3; 87:16; 109:15
cost 37:13
costs 34:5
COTTRELL 3:24; 4:1, 11,
12; 28:11
Counsel 3:7; 5:2, 8, 12;
6:9; 9:11; 11:23; 13:7, 19,
23; 14:9, 14; 17:17; 20:20;
21:6; 23:15; 24:19; 26:6;
27:24; 28:2, 17; 29:6, 11,
22; 36:23; 39:17; 40:15;
43:7; 44:13; 46:2; 48:17;
51:9; 75:16; 76:5; 77:12;
19; 78:12, 20, 21; 79:1;
80:19; 82:15; 83:1; 86:8;
91:3; 92:17; 98:23
counsel's 14:3, 12
count 55:8; 101:6
country 53:16
couple 32:21; 64:5
course 12:1; 32:7; 38:17;
44:7; 45:9; 49:22; 58:4, 8;
64:11; 69:20; 72:12, 24;
85:4; 103:6; 104:4; 112:3
Court 5:5, 6, 18, 23, 23;
6:3, 5, 17; 7:5, 11, 17, 23;
8:3, 11, 11; 9:10; 11:9, 11;
12:2, 17, 24; 13:21; 14:9;
15:1, 16; 16:7, 10, 20, 20;
17:10; 18:4, 12; 20:15;
22:8; 25:4; 26:23; 28:1, 15;
30:11, 13, 16; 31:7; 33:15;
34:6, 12; 35:1, 5, 11; 36:9;
38:18; 44:13; 48:22; 49:6;
51:23, 24; 52:5; 64:2;
68:18; 69:15; 81:2, 19, 22;
82:3, 8; 84:1, 5; 85:8, 9, 9;
89:9; 90:5, 5; 91:4, 16, 18,
22; 92:1, 21; 93:7, 12;
100:8, 12; 102:14, 18;
104:6, 14, 19, 19, 22;
105:3, 5, 8; 108:24; 109:4;
114:17
Court's 23:24; 34:23;
72:6
courthouse 96:13
courtroom 12:3; 17:19;
101:22; 102:7
courts 7:24; 8:1; 41:3
cover 68:16
covered 28:17
crafted 56:7
crafting 17:24
create 65:11
creates 77:19
creating 6:9
critical 105:7
critically 103:12
cross 66:22

curiosity 57:19
current 23:1, 1; 41:6;
99:18
currently 20:15; 26:12;
100:13
customer 34:4; 64:23;
65:24; 66:1
customers 50:2, 6;
52:11, 12; 54:21, 22; 65:22
cut 5:14

D

D 25:15
Dakota 81:21
damages 49:21; 50:24;
51:1; 52:10, 14; 57:14
Dan 15:21; 38:15; 48:19
dance 106:5, 8
Daniel 3:16
data 3:4; 16:16, 23, 24;
20:22; 21:9, 14, 17; 22:19,
24; 23:13; 26:1; 31:10, 12,
20, 24; 32:1, 10; 33:11, 13;
34:2, 5, 7, 13, 21; 35:21,
22; 36:3, 18, 19; 39:6, 16;
49:2; 50:10, 11, 16, 19, 20;
53:7, 8; 54:17; 55:19; 56:6,
9; 57:7, 13; 59:8, 14, 19,
21; 60:13; 61:13, 16; 62:5,
17; 63:6, 11, 12, 17; 64:8,
13, 14; 65:4, 11, 16, 17,
20; 66:4, 7, 13, 14, 15, 16,
17, 18, 20, 22; 67:5, 9, 16,
19, 23, 23; 68:4, 8, 19, 22;
69:6, 9, 23; 70:1, 2, 13;
73:5, 22; 74:6, 8, 9, 19;
76:18, 20; 77:14, 20, 20,
21; 78:15; 80:12; 84:18,
23; 85:1, 3, 11, 13, 22;
86:6; 87:12, 15, 19, 20;
88:15, 17, 20, 23; 89:3, 12,
16, 16; 90:1, 4, 15, 19;
91:6, 9, 24; 92:3, 9, 24;
93:19, 24; 94:1, 11; 97:19;
98:2, 3, 10; 99:5, 12;
104:10, 18; 105:8; 108:2;
113:24; 114:4, 18; 116:2, 3
database 65:5, 11; 67:21;
73:14; 85:16, 23; 86:3, 16,
20; 88:14, 19; 93:14, 20,
24
databases 86:12
date 69:11, 14; 115:8
dated 45:19
dates 107:2, 2; 115:9
day 17:18; 44:2; 77:12;
95:17, 20
day-to-day 17:18
days 47:23; 101:7, 13, 18;
102:9, 17; 103:10
deadline 68:20, 21
deadlines 10:12
deal 83:17; 95:8; 109:6
dealing 33:17; 41:8; 43:2;
67:21; 109:1

deals 67:13
dealt 58:14
December 20:16; 78:24
decide 52:1; 112:6, 12
decision 7:11, 12, 12;
12:6, 7; 30:21, 24; 36:10;
81:8, 19, 20, 20; 103:13;
109:11
declaration 24:15, 21;
63:13, 13; 80:4; 83:16;
86:5, 11; 87:2; 93:15;
100:9
declarations 22:5;
85:15, 20; 92:23; 93:3;
116:3
declined 7:12
defendant 28:10; 50:22
defendants 28:23
define 63:10; 74:6
defined 76:20
degree 94:8
delay 61:15
Dell 12:18
demonstrate 19:23
demonstrated 10:7; 84:9
demonstrates 93:12
depending 51:3
depends 76:19
deposition 98:13, 21;
104:21, 24; 105:2, 4, 17;
106:22; 111:6, 7, 15;
113:7; 114:13, 22; 115:10
depositions 9:2, 5
describe 39:12; 89:12;
94:10; 105:21; 109:22
described 21:12; 88:5;
92:24; 93:2; 105:16;
109:22
describes 94:22
description 89:15, 24
designated 34:1
desire 5:4
desk 100:21; 102:11
despite 62:9
detail 26:10, 12; 70:20;
71:24; 72:13; 77:10;
100:19
details 68:24
determine 104:16
determined 35:2
determining 34:8
develop 20:10
developed 93:5
development 15:19
dialogue 77:3; 87:7
dicta 8:17; 9:6
dictionary 74:9
differences 31:17; 37:5,
8
different 11:5; 17:19;
23:4, 8; 26:11; 28:6; 35:22;
51:2; 53:22, 24; 54:8, 14;
55:8; 63:10; 67:24; 72:11;
78:14; 79:3; 84:21; 86:23;

94:21; 108:20; 113:8
differently 52:11
difficulties 66:13
difficulty 69:3
dilemma 94:4
direct 25:21; 41:2; 91:5
directly 57:13
disaggregated 70:6;
91:6, 12
disclosed 13:14; 14:12;
27:6; 37:14; 99:20
disclosing 45:9
disclosure 13:18; 35:8;
79:8
discovery 4:5, 6; 8:12;
22:20; 26:13; 34:17;
51:16, 18; 52:6; 57:22, 22,
23; 58:13, 24; 59:3; 79:20;
82:6; 83:2
discretion 46:8
discuss 46:15; 59:24;
95:24
discussed 18:20; 57:20;
67:12; 97:15; 99:9
discussing 15:12; 23:7;
100:20
discussion 9:22, 24;
14:22, 24; 22:12; 24:8;
42:8; 45:1; 57:21; 63:2;
79:2; 88:7; 96:4; 105:22;
106:16, 19; 107:13
discussions 20:19;
21:24; 85:7; 90:7; 92:11
dismiss 51:20, 24
dispute 20:5, 8; 43:4, 6;
61:14
disputed 56:12, 16
disputes 8:12
disseminated 40:5;
100:11
distribution 49:18; 50:4,
7, 13; 51:4; 53:13
District 7:4, 15; 8:4, 24;
9:1, 1; 82:11
district's 6:7
disturb 17:7
doable 42:15
document 6:3; 8:8;
12:11; 25:21; 31:8, 9;
51:16; 103:24; 107:12
documents 13:8, 24;
14:2, 10; 19:22; 32:12;
33:8, 24; 34:1, 8, 10, 14,
18; 38:11; 40:1, 4
documents-only 7:8; 8:5
dog 43:23
done 38:12; 39:9; 47:21;
95:14, 15, 15; 104:1
door 65:24
doubt 33:16; 34:22; 35:1
down 31:13; 50:6; 53:10;
68:23; 73:19; 92:1; 95:1;
111:8
download 64:14; 67:22,
22

downloaded 68:2
draft 18:7
drawing 88:22
drill 95:1
dropping 23:3; 36:13
dry 97:10
due 6:5; 74:7; 103:6
during 11:19; 48:24;
63:7; 72:24; 78:13; 104:4,
15; 113:13

E

E-discovery 39:22;
48:23; 49:1
earlier 72:16; 89:19;
91:10
earnestly 92:2
easier 68:1
eavesdrop 113:14
economist 53:10; 56:8
effect 102:18
efficient 7:20; 113:10
effort 72:14; 76:5; 92:21
efforts 59:7
eight 61:22; 78:24
either 38:2; 58:23; 72:22;
74:11; 81:18; 82:7, 15;
106:12; 112:7
electronic 39:6, 16; 40:1;
54:9; 64:22
Electronics 3:4; 4:21;
67:21
elements 97:2, 3
Elliott 3:12
else 6:4; 46:18; 76:13
Email 77:5
Emanuel 4:23
empowers 8:2, 22
enables 102:14
encompass 33:10
encourage 90:4
encouragement 92:1
end 6:14; 36:5; 49:12, 17;
50:4, 7, 14; 51:3; 77:11;
86:1; 107:3
enforce 7:7
enforcement 8:4
engaged 30:9; 65:6
enough 55:16; 61:21;
70:13; 83:15; 91:21
entered 15:5; 18:13, 17;
19:9; 34:23; 38:18
entertain 5:18, 24; 9:11;
46:14
entitled 51:18; 83:9
entity 6:19
entry 10:4; 15:6; 30:12
especially 55:2
essence 44:20; 55:18;
98:14
essentially 39:23; 63:21;

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

67:8; 101:21
established 39:16
et 102:22; 104:10
etched 12:16
even 4:9; 22:2; 27:6; 35:5;
49:24; 61:12; 62:2, 18;
66:11; 77:18; 79:19; 80:2;
93:18; 95:16; 102:4, 20;
105:3; 108:19; 115:7
event 66:21
everybody 4:5
everyone 36:8
everyone's 24:14
evidence 53:3; 56:14;
59:11; 75:22
evolution 31:22
evolutionary 76:3
evolve 73:9
ex 103:1
exactly 31:20; 33:4; 36:2;
66:10; 72:10; 74:10;
93:19; 97:18
examine 46:4
examining 9:6
example 72:13; 73:16;
112:12
exception 101:19;
108:10
exceptions 15:8, 11;
101:12; 103:5
excessive 64:18
exclude 63:18
Excuse 43:11
exercise 8:3
exhaustive 81:3
Exhibit 24:16, 19; 25:14,
15; 75:9
exhibits 75:1
exist 41:7; 70:7
existing 26:21; 35:3
exists 9:23; 83:14; 85:4
expanded 41:11
expect 8:9, 16; 17:18;
48:14; 52:19; 59:2; 71:19;
77:3; 101:16, 20; 102:5;
103:9, 23; 108:8, 15, 21;
109:18
expectation 21:13;
26:22; 39:15; 108:19;
112:23
expected 22:19; 29:15
expedited 107:8
experience 18:3; 111:23
expert 41:1; 63:12; 80:4;
86:6, 10; 93:15, 16
experts 38:21, 22; 40:16,
19, 22; 41:9; 42:24; 43:13,
17; 44:4, 23; 45:5; 97:23;
100:3
explain 55:14; 69:22;
74:10; 76:5; 87:15; 88:13;
92:21; 105:7
explained 78:21; 92:17
explaining 59:3

explanation 17:6; 55:18
explore 11:8
exponentially 41:12
expressed 8:17; 60:18
extend 89:10
extensive 62:2
extent 12:16; 14:8; 29:20;
41:19; 59:6; 66:10; 68:5;
70:1, 2; 71:19; 109:21
extract 85:22

F

F 7:14; 8:18; 24:16, 19;
25:14
F.R.D 7:2
face 58:8; 61:18; 68:14
faced 110:16
facility 40:2
fact 12:12; 14:16; 16:23;
22:16; 23:3; 29:9; 35:17;
36:19; 43:16; 54:6; 62:14;
63:16; 68:1; 72:22; 75:20,
22; 80:13; 84:1; 89:9;
105:14; 113:18
factors 56:20, 22; 57:1
failed 113:19
fair 10:3, 6; 11:3, 8, 10;
43:1; 59:4; 76:11; 80:24;
81:23; 82:17; 88:1; 112:22
fairly 41:10
faith 76:4; 92:2; 113:2, 12
fall 28:22; 104:7
falls 113:4
familiar 39:20
far 37:5; 42:24
Farnan 5:23; 14:7, 18;
15:12; 27:10; 33:17;
57:21; 100:22; 101:9, 17,
24; 102:9; 103:3; 109:3
Farnan's 10:4
fashion 106:24; 115:5
feasible 65:9; 66:4
features 69:7
February 73:17; 74:2, 23;
75:6
feel 98:10
few 31:7; 37:1; 42:7; 66:9
fields 62:21; 64:13, 14,
15; 68:9, 11; 69:18; 73:13,
19; 74:10, 13, 16, 20, 21,
22; 90:20
fight 43:23
figure 74:20
file 15:8; 46:9, 20; 47:13,
18; 51:20; 64:22
filed 15:10; 46:6; 58:9;
68:17; 75:8
filing 12:10, 10; 15:9;
62:11; 63:1; 78:7
Finally 14:8; 36:12;
55:12; 68:5
financial 29:4

finding 5:21, 22; 15:6
findings 100:21; 102:22
fine 42:16; 48:11
Finklestein 3:21
firm 4:2
firmly 63:22
firms 23:11; 27:4; 40:17
first 16:17; 19:4; 37:3;
56:3, 21; 57:6; 58:10;
61:21; 64:7; 69:8; 75:17;
76:18; 80:3; 88:11; 91:4;
92:7; 97:21; 98:19
fit 74:21
fits 51:13
five 60:10
fixed 69:14
Flat 8:18
flaws 66:15
flesh 101:22
flood 36:1
focus 9:4; 42:11; 68:8;
72:22; 89:19
focused 59:1, 7
focusing 14:20
folks 95:18; 103:18, 20
follow 7:12; 85:23;
113:14
followed 58:19
following 10:2; 22:12;
24:8; 42:8; 45:18, 21; 69:8;
114:19
footnote 8:21
foreign 51:16
forge 95:2; 105:13
forged 108:17
forgot 99:2
form 64:8; 70:3; 85:21;
87:23; 88:16; 91:6, 9;
104:5; 113:1; 115:14
formal 6:3
format 85:12
former 114:16
forms 88:20
formula 50:24; 52:10, 13,
15; 54:20; 57:15
formulated 18:5
formulation 17:11
forth 21:19; 80:15
forward 35:18; 36:8;
46:17; 64:3; 97:16;
101:10; 105:23
found 13:4; 35:12; 37:8
Four 24:4; 26:2
Fournier 28:12
fourth 70:1
frame 46:21; 69:16;
76:16; 105:19, 20; 106:4
framed 10:1; 21:23; 43:6,
7
frames 46:16
Fred 4:1
Friday 101:6, 16
front 6:14; 60:7; 72:5;

84:5
fruitful 106:16
fruitfully 92:4
frustrating 87:10
Fry 6:19; 13:5
Fry's 3:3; 4:21, 24; 5:2, 3,
16, 17; 6:14; 7:1, 10;
10:15, 19; 11:14, 16; 12:9,
18, 19, 22; 13:3, 6, 10, 11,
15, 20, 22; 14:11; 15:7, 16;
16:1, 12, 14, 17; 17:1;
18:21; 19:2, 6, 7, 11, 17,
18, 19; 20:1, 2, 12, 15, 18,
24; 21:13, 22; 22:5, 9;
23:5, 12; 26:2; 27:8; 31:13,
14, 19, 23; 32:9, 11; 33:2,
12, 14; 34:21; 35:10, 21;
36:18, 21; 37:13, 15, 21,
23; 38:1; 40:21, 22; 41:2,
5, 8, 12, 18; 47:6; 49:7;
50:10; 52:11; 53:7, 21, 22;
54:1, 6, 11, 16, 20, 23;
55:13, 22; 56:19; 57:1, 6;
59:19, 20, 22, 24; 60:12,
15; 61:1, 5, 9, 12, 20; 62:2,
4, 11, 16, 18, 21, 23; 63:2,
4, 7, 16; 64:4, 8, 12, 20;
65:6, 13, 15, 21, 23; 66:1,
8, 17, 18; 67:4, 7, 14; 68:5,
7, 13, 19, 23; 69:8, 11, 17,
21; 70:16; 71:15; 72:9;
73:6, 7, 11, 12, 23; 74:8;
76:4, 24; 77:13, 14, 19, 20,
21; 78:13, 18, 20; 79:3, 7,
12; 80:1; 83:14; 84:6, 13,
20; 85:3, 6, 10, 15, 16, 24;
86:7, 7, 22; 87:1, 3, 12, 15,
18; 88:7, 13; 90:4, 7, 14;
91:5, 21; 92:9, 14, 17, 23;
93:5, 14; 97:1, 13, 19, 24;
98:3, 5, 11, 13; 99:4, 13,
22; 100:10; 104:16, 18;
108:2, 5; 109:10; 112:9;
113:24; 114:4, 18; 115:4;
116:4
FTAIA 51:17
full 11:7, 10; 16:8; 17:9;
26:18; 59:2, 21; 60:13;
61:5, 9; 67:5, 15, 19;
108:21; 112:22
fuller 22:4; 26:18
fully 29:15; 30:9; 31:19;
38:19, 19; 98:5
fundamental 93:22
further 9:12; 38:6; 41:13;
58:16; 75:22; 92:10; 98:9;
105:5

G

gaps 66:12; 77:6
gates 36:2
gather 113:19
gave 16:10; 17:7, 10;
25:5; 57:9; 73:21; 89:14
geeks 54:13
general 29:15

generalized 50:24;
52:10; 57:14
generally 85:18
generate 100:21
generated 88:21
generic 28:24
generously 17:10
gently 7:10
gets 6:6; 113:6
given 21:3; 22:24; 29:10,
17; 40:17; 41:6; 43:16;
83:13; 84:1, 4; 93:15;
100:12; 107:16; 109:9
gives 67:16; 69:15;
102:10
giving 10:12
Glass 8:18
goal 97:16; 98:4
goes 35:5; 45:22; 68:16;
71:19; 105:23; 113:13
Good 3:1, 10, 24; 4:19;
5:9, 11; 15:20; 66:16;
69:15; 72:13; 76:4; 92:2;
113:2, 12; 115:19
GRAHAM 4:19, 20; 5:8;
27:20, 23; 30:3, 17, 23;
31:4; 42:16; 96:17; 110:5,
21; 111:22; 112:18;
115:24; 116:13, 20
grant 71:10
granted 14:2
granular 66:17
Great 42:19; 56:21
greater 27:4, 7
greatly 13:11
grounds 41:13
guess 44:3; 48:13

H

H 75:9
H-O-L-S-T-O-N 43:11
hand 64:16
handed 25:15
handle 35:4, 13; 52:7;
113:23
handled 28:9
handling 53:4; 63:12
hands 41:1
happen 115:1
happens 93:1
happy 5:5; 6:24; 9:13;
25:11; 60:21; 81:14; 96:1;
98:23; 103:15
hard 65:3
harder 111:7
harm 13:11; 19:19; 27:14;
35:10; 37:15; 79:23; 83:13
harmful 35:9; 38:3
hasten 52:23
heading 26:4
headway 91:17
healthy 81:3

**Phil Paul v.
Intel Corporation****Hearing
May 1, 2007**

hear 5:5; 19:1, 4; 27:24;
77:13; 90:5; 98:23; 105:11
heard 35:17; 40:13;
61:22; 87:18; 103:15
hearing 3:2; 6:16; 11:1,
15; 20:12; 22:15; 42:2;
45:18; 92:8, 20; 95:9;
115:3; 117:3
hearings 11:4
heart 37:13
heightened 99:17;
107:13
held 22:12; 24:8; 29:17;
42:8
help 27:14; 68:13; 113:1
helpful 24:6; 30:19; 46:7
helping 111:19
Henri 5:1, 11; 71:22;
73:18; 74:3; 78:21; 92:9,
17; 108:4
Herculean 65:12
Hewlett-Packard 12:18
higher 50:13
highlights 82:19
highly 13:7, 17; 19:20,
24; 21:10; 29:2; 33:8, 20;
40:23; 42:23; 83:7; 109:1
History 26:4; 61:24; 62:8
Holston 43:10
Honor 3:11; 4:1, 13, 20;
5:10; 6:12; 9:16, 18; 15:21;
16:5, 13, 19; 17:5, 6; 18:2;
19:1, 5, 22; 20:8, 12;
21:18, 22; 22:4; 23:9, 18;
24:10; 25:1, 12, 24; 26:7,
10; 27:2, 20; 31:6, 17, 23;
32:3, 22; 33:13, 16; 34:11,
15; 35:14, 17; 36:1, 7, 14,
22; 37:2, 16; 38:6, 15;
39:20; 40:13; 43:19, 24;
44:10, 16; 46:24; 47:6, 19,
23; 48:18; 49:10, 21; 50:9;
51:13, 14, 21; 52:23; 53:6;
56:4; 57:3, 9; 58:2; 59:6;
60:8; 61:11; 62:1; 63:23;
65:1, 19; 67:11; 68:16;
69:2; 70:9, 18; 71:13;
73:17; 75:6, 15, 19; 77:12,
23; 78:10; 80:21; 81:6, 16;
82:1, 19; 84:4; 87:10;
88:13; 89:5; 90:24; 92:6;
93:18; 95:21; 96:8, 15, 21,
24; 97:4; 98:20; 99:2;
100:7; 104:12; 107:10, 21,
24; 109:9; 110:5, 8, 12;
111:11; 113:22; 115:16,
23, 24; 116:11
Honor's 15:24
hope 59:13; 112:1
hopefully 6:21; 98:4
hopes 4:5; 38:1
HORWITZ 4:14, 14
host 10:20
hours 106:10
huge 54:2

I

idea 69:15
identification 64:23
identifies 68:3
identify 14:14; 47:6;
62:20; 69:18
identifying 22:6
identity 14:12
ignored 7:10
immediately 88:16
impact 50:24; 102:24
impacted 52:12
Impax 28:24; 30:6
imperial 80:12
implicates 110:14; 112:5
implications 55:5
importance 101:9
important 5:3; 10:13;
13:1; 21:11; 28:20; 39:14;
53:4; 91:19; 99:3; 103:12;
108:24
impose 28:1; 41:4
imposed 50:5
improperly 40:5, 6;
83:15
in-house 5:2; 13:6, 19,
23; 14:9, 11, 14; 28:17;
29:6, 11, 21; 39:17; 44:21
inability 74:4, 6, 8
inadequate 63:5
inadvertently 27:6; 38:3
Inc 3:4; 7:2
inclined 45:24; 108:15;
109:20
include 15:1; 34:1; 37:22;
54:10; 105:16; 107:3;
108:1
included 34:7
including 8:4; 16:11;
22:5; 33:21; 50:10
incredibly 44:19
incumbent 53:2
indeed 3:17
indicate 60:10
individual 85:1, 13;
92:16
individually 51:2
individuals 44:9; 103:22
indulge 80:19
industry-wide 13:9; 33:9
inflated 50:2, 12
inform 99:6
informal 98:11, 20; 99:4,
7; 103:17; 104:15, 16;
112:17
informally 97:24
information 13:10, 10,
18; 19:18, 21; 21:10, 11;
23:7; 27:3, 6; 28:18, 23;
29:2, 4, 4, 7, 10, 13, 14, 15,
18, 19, 21; 33:5, 10; 34:2,

18, 20; 37:6, 10, 12, 12,
13, 23; 38:2; 40:24, 24;
43:23; 44:8, 15, 19; 55:24;
56:15, 15, 17; 64:24;
73:15; 74:15; 76:22; 77:1;
79:6, 11, 14, 17, 19; 80:8;
82:21, 23; 83:10, 12, 14,
18; 84:7, 8, 13; 85:18, 19,
20; 86:4, 16, 24; 87:4;
88:1, 11, 23; 92:14; 93:13,
16; 99:19; 100:4, 7, 11;
104:5; 108:18; 109:2;
112:11; 113:20; 116:6
informed 82:15
initial 17:24; 75:8
initially 76:2; 116:1
injured 51:5; 54:21
input 10:9, 10; 65:5, 10
insofar 42:22, 24; 83:2
instance 28:3; 30:14;
66:17; 78:17
instant 78:7
Instead 86:2
instituted 82:11
insufficient 77:9
Intel 4:15; 20:21; 23:10;
25:5, 16; 36:13; 41:8; 45:7;
49:13, 23; 50:1, 5; 51:15,
20; 52:7, 9, 17, 19, 24;
53:5, 17; 61:15; 81:9, 10,
13, 16
Intel's 23:1; 49:15
intend 5:20; 6:2
intending 43:17
intends 37:19
intentionally 38:3
interest 11:24; 26:3;
44:17; 110:24
interested 21:2; 111:18
interesting 7:9; 76:14, 15
interests 38:13
interface 88:19, 22
interfered 91:19
intermediaries 50:12,
14, 17, 18; 53:12; 56:16
into 10:10; 11:18; 15:18;
41:1; 45:2; 51:13; 58:19;
65:5, 10; 72:14; 73:19;
88:15, 24; 93:24; 100:19;
107:12
investigation 86:14
invited 18:4
invoice 64:22, 22
invoices 64:21, 24; 65:2,
8, 12
involve 30:4; 103:18, 20
involved 17:22; 18:3;
22:21; 27:5; 30:5; 104:9;
116:17
involves 69:20
involving 14:21
issuance 6:16
issue 4:6; 5:21; 6:2; 7:24;
8:9; 18:24; 19:4; 21:23;
32:24; 33:22; 37:11; 41:9;

42:11; 51:7; 57:11, 13;
67:1, 6; 68:16; 71:19;
75:17; 87:8; 100:22, 23;
101:9; 102:21, 22; 103:3,
12; 106:12; 110:6
issued 3:5; 7:11; 20:15;
22:16; 27:9; 31:1
issues 5:15; 14:21; 16:8;
51:17, 19, 22; 55:5; 58:9,
15; 61:19; 66:23; 72:11;
91:19, 22; 101:2; 112:8

J

Jennifer 4:3, 3, 8
Jonathan 63:14; 86:5
Jones 3:11
Jordan 28:10; 29:9, 17;
46:4; 102:2
Jordan's 42:12
Judge 5:22; 8:22; 9:1;
10:4; 14:7, 17; 15:12;
27:10; 28:10; 29:9, 17;
33:17; 42:12; 46:4; 57:21;
100:22; 101:8, 17, 24;
102:2, 9; 103:3; 109:3
judges 109:4
judgment 47:13; 90:13,
17, 19; 94:6, 9
judgments 53:19
juncture 16:3; 94:5
June 3:5; 11:1, 5; 15:5;
19:14; 20:12; 43:9; 45:19
jurisdiction 5:17, 24;
100:23
jurisdictional 101:21
jurisprudence 6:7

K

Karen 3:21
keep 32:10; 64:9, 10, 21;
66:4; 74:20; 87:19, 22;
88:8; 89:12, 16; 101:10;
103:12
keeps 90:4; 91:9; 97:19;
98:4
kept 90:1, 20; 93:20;
104:10
key 59:10; 69:7
kidding 106:8
kind 18:9; 25:10; 29:14;
33:13; 36:3; 54:16; 65:8;
74:15; 100:15; 111:8
knew 17:12; 32:13
knowledge 40:21; 58:1;
86:12; 98:2

L

lack 87:11
Landau 3:19
landscape 19:17; 23:9

language 13:2; 14:16;
18:9; 39:13; 43:7; 45:17,
21, 22; 71:10
large 55:7
Laser 4:3
last 4:6; 35:14
later 7:11; 29:13; 30:12;
59:21; 61:9; 101:3; 113:8,
15
law 8:10; 18:20; 23:11;
27:4; 40:17; 51:7, 10; 52:2;
82:7, 7, 9, 10; 112:13
lawsuit 13:14
lawyers 27:4; 44:21;
97:24; 100:3
lay 107:1
lays 102:15
lead 69:5
leader 55:2
leading 10:4
learn 88:10; 104:23
learned 104:3, 15, 23
least 5:15; 20:22; 29:12;
62:10; 66:8; 72:23; 82:14;
95:2; 115:9; 116:7
leave 46:8; 116:16, 17
led 20:18; 50:13; 58:18
legal 5:2
legitimate 44:17
less 32:5; 54:21; 67:9, 9;
69:1
letter 73:18; 74:3, 23;
75:7, 9; 89:9
Levan 107:6
level 26:10, 11; 63:14;
70:3, 5, 6; 73:5; 99:17
Liability 7:14
light 55:16; 77:3; 101:2,
9, 14, 15
likely 41:20; 113:5; 114:4
limit 47:8, 12; 48:4; 68:10
limited 83:3
line 49:17; 50:6; 54:3, 10
lines 59:3
list 73:12, 19; 74:16
listed 26:4
listen 4:8; 103:15
lists 33:24; 34:4
literally 10:7; 17:23;
76:13; 112:24; 113:14
litigation 7:6, 14, 19; 8:2,
12, 18; 13:7, 19, 23; 14:9,
11; 28:11; 43:18; 81:21;
84:2; 97:18
little 77:15; 87:7, 9; 94:21;
110:11
location 40:1
lodging 116:19
long 47:21; 48:15; 59:20;
106:3; 116:11
look 18:5, 7; 33:6; 42:1,
21, 23; 43:2; 51:2, 10;
56:24; 76:15; 102:3
look-up 73:21

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

looking 43:9; 50:19;
55:24; 64:6; 65:4; 70:20;
72:10; 73:4, 5, 20; 74:7;
17; 80:20; 82:10; 84:10;
94:17; 111:13; 115:14
Los 4:3
lost 55:2
lot 45:5, 6; 55:9; 71:4, 8;
91:17
low 55:3

M

main 4:4
mainly 67:7
maintain 73:14; 84:22;
85:11, 13
maintained 85:21; 92:15,
24
maintains 32:6; 62:21;
77:14; 86:8; 87:1, 12; 92:9
majority 8:14; 9:8
makes 40:16; 85:2;
105:17, 19; 106:18;
108:16
making 69:21; 79:16;
101:16; 107:4, 14; 108:15;
111:17
manner 38:4
manufactures 49:13
many 24:3; 35:17, 23;
40:18, 19; 41:3, 20; 45:6;
53:22; 54:4, 8; 62:9
March 71:21
Marcus 3:21
margins 34:3
market 49:23; 51:1;
52:15; 54:22; 55:1
marketplace 20:3
Mary 4:20; 107:5
MASTER 3:1, 13, 17, 22;
4:10, 17; 5:7, 12; 6:13;
9:19; 15:22; 16:2; 17:16;
18:18; 19:3; 20:4, 9; 21:5;
22:10, 14; 23:14, 19, 22;
24:7, 11, 17, 23; 25:2, 7,
10, 17; 26:5, 8, 15, 20;
27:11, 16, 19, 21; 29:23;
30:15, 20; 31:2, 5; 32:20,
23; 35:7; 36:23; 38:7;
39:11; 40:8, 10, 14; 41:15,
22; 42:6, 10, 18; 47:1, 4,
11, 17, 20; 48:1, 3, 10, 20;
49:8; 51:6; 52:18; 55:21;
57:5, 17; 58:6, 20; 59:9,
16; 60:1, 6, 9, 20; 61:2, 10;
67:3; 70:19, 24; 71:6, 16;
72:15, 21; 73:24; 74:24;
75:4, 10, 13, 16; 76:10;
77:2, 16, 24; 78:11, 19;
80:16, 22; 81:7, 17; 82:2,
5, 22; 83:19; 84:15; 85:17;
86:3, 17, 21; 87:6, 24;
88:4, 9, 14, 19; 89:6, 17;
90:9; 91:2; 92:5; 93:1, 4, 8,
20, 23; 94:3; 95:23; 96:5,

9, 18, 22; 97:6, 9, 14;
98:16, 22; 99:8; 100:1, 5,
14, 18; 102:14, 16; 105:10;
106:7, 13, 17, 20, 23;
107:11, 20, 22; 108:7;
109:12, 17; 110:19;
111:20; 112:17, 19; 113:9;
114:10, 14; 115:2, 13, 18;
116:9, 15, 22; 117:1
material 42:22
materials 20:1, 1; 21:3;
22:3, 7; 33:20, 21; 83:8, 8
matter 65:23; 106:2;
116:1
matters 115:20
may 4:5; 5:13; 6:4, 9;
10:19; 12:9, 23; 13:1;
19:13; 34:17; 43:19; 44:5;
46:19; 52:7, 16; 53:1, 5;
57:3; 66:2, 12, 13, 15, 16,
16, 19; 68:1; 71:7; 76:14,
15; 82:2, 3; 95:10, 13, 16;
102:4; 105:6, 12; 107:9;
113:10; 115:8
maybe 5:14; 39:20; 111:1
McCutcheon 4:16
mean 46:19; 65:10; 66:3;
71:9; 72:7; 76:11, 14;
80:17; 83:21; 89:21;
90:21; 91:17; 94:7; 98:17;
101:4; 108:3, 11; 111:5, 11
meaningful 70:14; 87:3
means 49:20; 114:20, 21
meant 32:18
measure 113:12
medium 60:21; 64:15;
67:22
meet 20:17; 71:20; 73:1;
75:18, 20; 78:2, 6, 23;
85:6; 87:17; 94:19; 97:24;
103:17; 105:20; 107:3;
113:2; 115:5
meeting 61:23; 62:3;
63:23; 98:7, 11, 20; 99:4,
7, 16, 21; 100:3; 103:23;
104:4, 15, 17; 106:11;
110:7, 9, 23; 111:24;
112:16, 18, 24; 113:13, 13,
15, 17, 24; 114:3, 23
members 50:8
memorializing 104:1
mention 59:17
mentioned 20:11; 34:15;
89:18; 112:5
merchant 85:17; 86:3;
88:14, 18; 93:1, 20, 23
merit 51:22
merits 57:24; 58:17, 19;
59:15, 20; 60:13; 78:8
met 61:20; 80:2; 84:11
microprocessor 49:12,
15
Microsoft 12:18; 15:3;
81:21
might 22:3; 28:1; 57:7;
82:21; 83:11, 17; 110:8

millions 79:14, 14; 84:19,
19
Milstein 3:20
mind 6:11; 34:23; 107:1,
4
mindful 9:4; 71:21;
72:21; 80:23
minds 12:17
minimize 73:22
minimum 96:4
minute 12:12; 25:22;
90:11
minutes 41:24; 42:7;
96:7, 11
missing 97:6
mistaken 77:19; 112:21
misunderstandings
64:6
misuse 44:15
Mm-hmm 60:5
model 63:9
models 54:4, 8
modification 21:1;
26:19; 41:13; 62:6
modifications 36:4;
41:21; 76:23
modified 71:1
modify 29:8, 20; 30:12
moment 6:10; 9:21;
22:11; 23:15; 41:23;
42:11; 75:11; 80:17, 18;
83:23; 89:20
monitoring 37:20
monopolization 50:1
monopolized 49:23
month 19:14; 32:18
monthly 31:12; 32:1, 10,
13; 87:19, 21, 21
months 61:22; 62:14;
78:24; 85:11
more 19:13; 26:18, 18;
35:16, 20; 37:5; 42:7; 54:4;
55:23; 57:18; 58:24; 74:4,
6; 83:11, 21; 88:15;
102:10; 111:24
morning 3:1, 10, 24;
4:19; 5:9, 11; 15:20; 67:12;
72:16; 116:2
Morris 4:20; 80:20, 24;
81:1
most 7:24; 8:1; 26:3;
37:14; 65:19; 70:6; 82:20;
91:6; 113:10; 114:4
motion 5:19; 20:23; 23:2;
51:19, 23; 52:2; 55:11;
62:11, 15; 63:2; 69:4; 78:7;
89:11; 105:6
moved 31:24
moving 21:20; 58:19;
64:2; 72:18, 24; 75:21;
101:10
much 3:23; 27:7; 67:24;
96:20
multi-district 7:6, 19;
8:2, 11, 23; 84:2

multiple 12:11
must 69:9; 84:6
mutually 45:16
myself 90:3

N

N-I-D-E-K 7:2
name 80:6
native 39:24; 40:4
nature 10:6; 11:4; 16:6, 9;
21:3; 22:7; 40:22; 44:8;
61:7; 91:23; 94:17
neat 73:19
necessarily 49:6; 52:24;
63:17
necessary 4:9; 61:13;
73:15; 79:18; 80:9; 81:12
need 6:21; 9:12; 24:3;
37:17; 42:6, 20; 46:12, 12;
47:10; 50:4, 9; 51:2; 52:5;
53:7, 12; 55:4; 56:10, 11,
17, 19, 21; 57:7, 8, 10;
59:11; 60:12; 63:19, 24;
79:21; 80:11; 82:21, 23;
83:8, 10, 11, 18; 84:6, 7,
12, 18; 101:7; 104:13, 21;
114:12; 115:8
needed 28:15; 55:19;
62:22; 69:21
needs 34:21; 108:4
negotiate 11:11; 13:12;
68:23
negotiated 28:4, 14, 16;
62:15
negotiating 30:10
negotiation 30:1; 92:3
negotiations 17:8;
31:23; 62:1, 9, 12, 24;
64:3; 72:8, 12; 73:9; 79:10
new 88:1; 92:20
next 101:3
Nice 4:17
Nichols 4:20
Nidek 7:2
nlne 55:8
non-parties 8:13; 10:10;
43:15, 21; 44:6, 14, 18
non-party 37:21
non-public 34:2, 2, 4, 4
non-start 76:13
non-starter 78:5
non-testifying 38:22
non-testimonial 45:7
none 55:13; 62:17
nonparty 79:20
nor 45:10; 49:24; 56:12,
16
normal 14:1
Northern 7:3, 15
note 6:8, 23; 8:19; 14:19;
24:13; 40:16; 41:16;
60:17; 71:17

noted 19:11; 78:13
notes 98:24
notice 22:18; 23:6; 41:4
notion 36:12; 56:11, 13
notwithstanding 5:20;
6:3; 11:17; 12:2; 21:6, 9,
12; 22:15; 29:5, 16; 58:21
November 17:2
number 12:11; 15:2;
17:19; 26:2; 27:4; 33:7;
40:17; 41:9, 11, 19; 43:4;
44:4; 62:4; 71:1, 7; 78:22;
79:5; 101:7
numerous 27:10

O

O'Melveny 4:2, 4
oath 94:11, 12
object 18:17; 22:20; 41:5
objected 18:15
objection 33:3, 6; 116:10
objections 10:17, 21;
11:9, 16, 21; 12:4; 13:3;
15:13; 16:11; 19:12;
21:22; 29:8; 36:9
objects 13:6
obligation 45:10
observation 90:22;
100:15; 105:11
observations 15:3
obtain 21:3
Obviously 43:20; 66:4;
111:18
occasions 27:10; 78:22
occur 98:7; 113:5
occurrence 41:3
October 17:3
off 22:12; 24:8; 42:8; 88:6,
8; 95:24; 110:9; 112:18
offer 45:13; 62:16; 63:6,
22
offered 11:21; 13:20;
59:18; 68:6; 86:7
offers 55:1
office 14:3; 39:18; 107:4
often 50:21; 111:7
Once 27:2; 36:8; 59:2;
62:16
one 4:3; 5:15; 9:21; 14:5,
22; 22:3, 11; 23:15; 27:24;
28:24; 29:19; 37:17;
40:20; 41:2, 23; 42:11;
62:4; 63:6, 11; 70:8; 71:1;
75:2, 11; 80:18; 81:3;
92:23; 94:23; 98:7, 12;
99:2; 103:13; 104:16;
109:20; 110:12; 111:2;
114:2, 3; 116:1, 2
ones 49:18
ongoing 21:24
only 8:23; 11:8; 12:19;
14:1; 15:10; 31:22; 44:12;
58:5; 60:17; 61:6; 65:22;

**Phil Paul v.
Intel Corporation****Hearing
May 1, 2007**

68:15; 87:18; 89:14; 94:8;
98:19; 100:3; 103:3;
116:13
onto 64:15; 67:22
open 36:1; 72:9; 85:9;
112:23
opening 48:14; 68:18;
75:24
opportunities 10:8
opportunity 8:7; 10:16;
11:8; 10; 15:7; 17:23; 18:7;
16; 41:5; 42:12; 46:2; 13;
51:10; 52:20; 94:10;
101:12; 105:16; 112:22;
113:2
oppose 50:22; 89:10
opposing 14:14
opposition 16:15; 83:17
order 6:17; 8:9; 9:23;
10:5; 9, 11, 18, 24, 24;
11:12; 12:8; 13:16, 22;
14:6; 15:14, 17, 19; 16:8;
17:12, 24; 18:6, 13, 17, 24;
19:9, 12; 21:1, 7; 26:19;
21, 23, 24; 28:4; 13, 18;
29:6, 9, 20; 30:2, 3, 11;
31:1; 33:4, 18, 23; 34:9;
16, 23; 35:3, 6, 12, 17, 19,
24; 36:4, 11; 37:18; 38:18,
20, 24; 39:3, 9, 13, 22;
41:7, 14, 18; 42:21; 46:1;
57:20; 62:6; 67:13, 16;
76:9, 12, 17, 24; 78:4;
95:17, 20; 99:19; 100:13,
24; 101:19; 102:1, 5;
103:2; 108:9, 20, 21, 22;
109:20, 24; 110:14; 112:4;
115:14
ordering 112:10
orders 13:13; 102:21
ordinary 32:7; 44:7; 45:9;
64:11; 85:4
original 30:2; 33:3;
35:19; 57:20; 68:17
Orszag 63:14; 80:4; 86:5
others 16:17; 39:21
otherwise 44:16; 102:17
ought 30:14; 44:22
ourselves 54:19; 97:1
out 11:10; 23:3; 27:3;
35:15; 36:9, 13; 44:11;
51:14, 21; 54:7, 14; 55:12;
57:18; 64:21; 65:3; 66:20;
74:21, 22; 94:18; 102:15,
16; 106:11; 107:2; 110:12;
112:24
outcomes 114:3
outlets 54:3
outlet 28:14; 30:11; 53:9
outside 14:3; 99:20;
115:9
outweigh 56:23
outweighed 56:20
outweighs 79:23
over 29:7; 54:7; 64:16;
66:2; 92:6

overcharge 50:5
overlap 66:11, 11
overlaps 66:7, 20
own 9:6; 49:19; 54:15, 16;
65:11; 90:19

P

p.m 117:3
Page 7:22; 8:6; 13:4;
35:7; 43:2, 9; 44:11; 45:2;
48:4; 60:3
pages 48:6, 10
paid 50:12, 16
paper 94:6
papers 24:16; 46:6, 9;
54:6; 55:10; 59:18; 65:19;
70:8; 85:8; 94:7, 13
Paragraph 14:13; 43:14;
45:20, 21
paragraphs 12:15; 43:3
parameters 110:6; 115:9
part 5:4; 8:21; 23:24;
26:1; 33:7; 56:6, 6; 86:15;
97:21; 98:19; 99:2, 10;
103:15
parte 103:1
partial 20:7
participate 4:9; 17:11,
23; 20:13
participated 30:1; 90:6;
92:11
participating 20:23; 23:2
particular 12:9; 18:15;
37:6; 53:7; 63:8, 9; 83:22;
91:22, 23; 92:3
particularized 79:16;
80:7; 83:9
particularly 37:11; 80:9;
84:13; 108:16
parties 10:8, 10, 16, 21;
11:24; 13:12, 14, 18;
14:10, 20; 15:8; 16:11;
17:8, 9, 11, 12; 18:4, 6, 12;
21:19; 22:1; 23:3; 27:5;
28:5; 30:1, 4, 5; 31:24;
32:4; 35:23; 36:2, 14;
38:12, 14; 41:9, 17, 20;
43:5, 5, 13, 16; 44:2; 45:3,
4, 12, 14, 16, 19; 56:1;
58:11; 62:20; 66:22;
68:23; 69:18; 76:21;
78:14; 79:5, 9; 84:21, 23;
86:13; 97:3, 17; 116:12
parts 11:12
party 10:15; 12:19; 14:15,
15; 15:10, 17; 18:14, 16;
21:13; 28:1, 5; 30:6, 8;
32:6; 35:10, 15; 83:3, 4
party's 66:12, 14
pass 53:11, 13; 55:6;
56:10, 12, 14
pass-on 50:15
passed 50:6
past 28:22

people 69:21; 108:4;
109:10; 112:1
perhaps 4:8; 22:20; 84:3;
102:4
period 63:7, 11; 70:10
permit 9:13; 15:16
permitted 40:6
permitting 98:4
person 92:23
personnel 98:1
perspective 90:12
pharmaceutical 29:1
phase 57:21; 82:6
Philip 80:20, 24; 81:1
phrase 71:7; 72:19
pick 54:14
picked 53:21
picks 70:16
piece 76:18; 101:21
pieces 77:7
place 6:18; 14:1; 22:1;
56:9; 100:13; 104:20;
108:1
places 12:11; 94:24
plaintiff 83:2
plaintiffs 3:3; 9:18;
15:21; 16:3; 19:15, 16;
20:17, 20; 21:4; 23:5, 12;
26:13; 28:24; 31:10, 18;
33:7; 37:19; 38:16; 40:16,
18; 48:19; 49:11; 52:1;
55:20; 56:6; 58:4, 5; 59:7;
60:10, 16; 75:21, 23, 24;
76:1, 2, 5, 22; 77:12; 78:5,
13, 15, 22; 79:1, 6, 12, 15;
80:1; 82:20; 84:8, 11, 24;
85:2, 10, 12, 19; 86:5, 9, 9,
10, 23; 90:16; 92:8; 93:13,
15, 16; 97:22; 99:16;
100:10
plan 89:13, 14
planning 29:3
plans 97:17
play 41:10
please 3:9; 9:21; 12:13;
19:4; 23:15, 22; 24:12;
25:20; 26:8; 27:22; 31:3;
36:24; 40:14; 41:23; 42:3;
46:22; 47:24; 48:4, 13, 17,
20; 56:2; 57:5; 74:1; 75:1,
3, 18; 78:9; 80:18; 84:16;
86:18; 92:5; 96:23;
100:16; 110:4; 112:21;
115:21; 116:23
podium 91:1
point 17:14; 18:23; 20:10,
13; 26:9; 34:11; 35:14;
38:10; 47:12; 52:4; 55:12;
57:7; 63:6, 11; 84:16;
87:10; 89:23, 24; 92:7;
93:7, 10; 96:1; 99:15;
104:8; 105:2; 106:6;
110:10, 13, 23
pointed 51:14, 21;
110:12
points 32:21; 37:9; 54:6;

57:1; 60:23
POPPITI 3:1, 13, 17, 22;
4:10, 17; 5:7, 12; 6:13;
9:19; 15:22; 16:2; 17:16;
18:18; 19:3; 20:4, 9; 21:5;
22:10, 14; 23:14, 19, 22;
24:7, 11, 17, 23; 25:2, 7,
10, 17; 26:5, 8, 15, 20;
27:11, 16, 19, 21; 29:23;
30:15, 20; 31:2, 5; 32:20,
23; 35:7; 36:23; 38:7;
39:11; 40:8, 10, 14; 41:15,
22; 42:6, 10, 18; 47:1, 4,
11, 17, 20; 48:1, 3, 10, 20;
49:8; 51:6; 52:18; 55:21;
57:5, 17; 58:6, 20; 59:9,
16; 60:1, 6, 9, 20; 61:2, 10;
67:3; 70:19, 24; 71:6, 16;
72:15, 21; 73:24; 74:24;
75:4, 10, 13, 16; 76:10;
77:2, 16, 24; 78:11, 19;
80:16, 22; 81:7, 17; 82:2,
22; 83:19; 84:15; 86:17,
21; 87:6, 24; 88:4, 9; 89:6,
17; 90:9; 91:2; 92:5; 93:4,
8; 94:3; 95:23; 96:5, 9, 18,
22; 97:6, 9, 14; 98:16, 22;
99:8; 100:1, 5, 14, 18;
105:10; 106:7, 13, 17, 20,
23; 107:11, 20, 22; 108:7;
109:12, 17; 110:19;
111:20; 112:17, 19; 113:9;
114:10, 14; 115:2, 13, 18;
116:9, 15, 22; 117:1
portion 59:11
portions 47:7
position 19:6; 22:8; 29:5;
52:20; 55:22; 59:22; 62:4;
83:23; 109:11
positions 72:11
possibility 27:5, 14;
66:19
possible 53:18; 114:8
post-filing 69:3
posture 23:1, 2
potential 19:19; 22:23;
79:23; 83:13
potentially 41:10
Potter 4:15
power 7:7; 8:3
powers 9:1
practical 53:18; 65:23
practice 18:19; 21:15;
54:24
pre-identified 103:22
precedent 29:12
precise 23:6; 62:21;
71:24
precisely 21:17; 50:18;
74:4, 5, 6; 95:1
precluded 13:24
prefer 19:1, 4; 27:24;
35:16; 91:15; 112:22
preferable 32:3
prefiling 62:15
premise 78:1, 4
preparation 34:17

prepared 38:10, 19;
104:20
presence 11:11
present 3:8; 11:7, 23;
97:4
presentations 12:1
presently 12:21
presumably 32:16;
97:17
pretrial 7:18; 9:2
pretty 74:5
prevent 27:14
previews 71:23
previously 21:22
pricer 55:1
prices 50:2, 12, 13, 16,
17; 54:18; 55:3
pricing 34:2; 37:12;
54:19
Prickett 3:11
primarily 49:14
print 64:21
printed 65:3
prior 16:7; 19:14; 20:14;
36:7; 103:22
private 79:4
proactively 18:4
probably 30:24; 61:21;
66:6; 70:11; 71:12; 80:5;
97:11
problem 15:23; 92:12;
96:19
problems 76:6
procedure 97:2
procedures 39:4, 16;
97:16
proceed 3:7; 5:13; 58:13;
78:8
proceeding 6:15; 9:10;
10:14; 11:19, 20; 17:22;
18:10; 89:19
proceedings 7:19; 9:3;
10:6; 16:7, 9; 17:9; 35:19;
36:7; 82:6; 100:8; 105:5
process 10:4, 13; 17:21;
20:17; 69:2; 72:14; 76:4;
105:15; 113:15
produce 3:4; 17:14;
18:14; 31:20; 32:14;
51:15; 55:17; 60:13; 62:5,
16, 19; 63:3, 6; 64:9, 10;
65:13, 16; 67:6, 9, 15;
68:19, 22; 69:9; 70:6; 71:3;
73:11; 74:8; 76:18, 24;
86:7; 87:4, 20; 91:5
produced 14:10; 19:21;
29:10, 16; 33:6; 34:24;
35:22; 38:11; 39:6; 62:17;
70:4; 74:14; 91:24; 92:4;
114:6, 19
producing 14:15; 16:16;
32:5; 35:10, 21; 36:2;
66:12; 67:5, 19; 89:13, 15
product 45:8; 63:6, 9
production 16:24; 32:19;

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

33:13, 19; 34:13; 35:4;
36:18; 49:2, 4; 59:8, 13,
14, 21; 60:24; 61:5, 9, 15;
62:22; 65:2; 66:7, 21;
68:11, 24; 69:6, 12, 16, 19,
20; 79:23; 87:14; 91:23;
108:1
productions 39:24
productive 48:15; 69:4;
111:3; 112:1, 2
Products 7:14; 54:10;
63:10, 18
profits 34:3
program 68:3
progress 62:10; 91:20
promote 7:20
proof 52:16; 55:6; 81:12;
83:4
proofs 22:21
proposal 18:5; 63:3;
97:21; 98:15, 17
propose 45:24; 46:21;
69:13; 70:9; 98:6, 9; 99:22;
101:17; 106:9; 116:18
proposed 5:22; 10:18;
12:8; 15:13; 19:12; 33:3;
49:14; 50:7; 53:3; 100:21;
101:6; 111:1
proposes 106:3
proposing 115:4
proposition 7:5
proprietary 19:20, 24;
29:18; 93:2
propriety 18:9
protect 38:13; 99:11
protected 34:22
protecting 111:3
protection 10:24; 11:1;
26:22, 24; 35:16; 40:20;
44:11; 49:7; 67:17; 84:6
protections 34:8; 35:2;
37:18; 38:1; 39:7; 40:3;
112:9
protective 6:17; 9:23;
10:5, 9, 11; 11:12; 12:8;
13:16, 22; 15:13, 17; 16:8;
17:12; 18:6, 13, 23; 19:9,
12; 21:1, 7; 26:19, 21;
28:4, 13, 17; 29:6, 8, 20;
30:10; 33:4, 23; 35:3, 6,
12, 16, 19, 24; 36:4, 10;
37:18; 38:18, 20, 24; 39:2,
9; 41:7, 14, 18; 42:21;
46:1; 62:6; 67:13, 16; 76:9,
12, 17, 24; 78:3; 99:19;
100:12, 23; 102:1; 108:20
protested 29:1
prove 49:21, 22; 50:4;
53:11, 13; 56:11, 14
proverbial 54:12
provide 10:16; 20:1;
39:7; 46:2; 92:21
provided 34:9; 38:23;
39:8; 44:9; 104:6
providing 10:21; 101:5
provision 18:15; 28:20

provisions 11:12; 28:6;
38:20; 39:21
public 79:4; 116:7
purchase 13:9, 13; 26:4;
33:9; 36:20; 56:15; 85:23;
86:3
purchased 51:4
purchases 31:14; 32:13;
49:14; 66:6; 73:6; 87:22
purpose 7:18; 9:2; 36:6;
113:23
purposes 6:7, 8; 9:9;
13:1; 15:15; 48:15; 57:10,
23; 59:1, 12, 20; 60:12;
61:8; 63:19; 68:10; 88:20;
107:15
pursue 112:14
push 37:20
put 16:6; 22:18; 36:8;
52:17; 56:9; 64:1; 67:5;
84:5; 88:24; 104:20;
108:1; 116:3
puts 88:20; 93:24; 108:10

Q

quality 66:24
Quinn 4:23
quite 21:23; 44:4
quote 13:5; 43:12; 45:2,
22

R

raised 5:15; 16:17; 51:19;
72:12
raising 16:14; 51:16
rather 46:17; 68:2; 81:3;
106:21
rationale 102:6
Re 7:13; 8:18
reach 62:2
reached 76:8
react 94:11
read 13:2, 6; 14:13;
38:17; 39:1; 45:1; 94:5
reading 98:24
reads 8:21
real 111:24, 24
realize 46:16; 113:10
really 31:16; 35:22; 36:4;
39:9; 51:19; 55:13, 20;
57:18; 60:22; 61:12;
62:24; 63:5; 65:22; 67:23;
74:18; 81:15; 97:10;
110:24; 111:8, 9; 112:13;
114:20
reason 6:2; 17:6, 15;
32:2; 37:16, 17; 58:3;
61:12, 17; 62:12; 87:13;
103:10; 112:4
reasoned 8:15; 9:7
reasoning 112:15
reasons 53:6; 55:16;

56:4; 57:9; 60:18; 67:12
recall 28:15
receipt 66:2
receive 99:4
received 12:17
receiving 10:22; 60:11
recently 88:7, 12, 12
recess 42:5; 96:16
recognition 20:21
recognized 7:17
recognizes 44:20
recommendation 5:22;
14:5; 15:1, 4, 6
recommendations 12:7;
102:22
reconvene 42:2, 3
record 3:8; 6:9, 22; 9:13;
13:2; 22:5, 13; 23:24; 24:9;
26:18; 42:9; 45:24; 48:16;
71:18; 84:4; 88:6, 8; 90:18;
92:22; 93:6, 9, 12; 95:24;
101:14, 15, 23; 110:9;
111:17, 19; 112:18; 113:6,
20
records 36:20
redact 64:23
redacted 116:6, 18
reduce 68:13
reference 6:15; 7:21; 8:5;
12:10; 39:14; 42:20; 74:1;
75:1
referenced 46:4
referring 6:19
reflects 65:5
refuse 13:21
regard 9:13; 68:13; 86:23
regarding 8:10; 12:8
rejected 60:18
related 29:3; 85:18
relates 43:12, 14; 110:11;
111:2, 3
relating 10:24; 48:23;
85:13
relevance 55:14, 16;
110:16
relevant 8:10; 44:6; 47:8;
50:20; 55:19; 57:13; 63:7;
68:9; 79:17, 20; 88:11;
98:3; 112:11
relied 80:14
relief 68:17; 69:7; 70:22;
71:10; 75:23; 76:1
relook 75:11
rely 80:11
remains 89:2
remember 14:4; 25:18;
101:6; 113:23
reopen 17:7
repeatedly 68:7
reply 24:16, 22; 60:4;
70:20; 75:23; 76:1; 80:3;
83:16; 85:2; 86:4
report 6:17; 12:7; 14:6,
17; 15:4, 8, 10, 11; 43:2;

45:2; 106:11
REPORTER 116:24
reports 88:21; 89:1
represent 28:10; 49:5, 12
representation 85:5, 7, 9
representative 53:20
representatives 53:2
represented 32:9; 86:8
representing 11:24;
23:11; 40:18
reputation 54:24
request 13:22; 22:9;
26:2; 31:8, 9; 32:11; 56:5;
64:12; 69:7; 74:13
requested 27:9; 40:21;
43:15; 75:24; 87:5
requesting 26:19; 32:1,
1; 70:21
requests 13:15, 23;
14:11; 68:10; 75:23; 76:1
require 32:14; 34:17;
73:11; 115:8
required 87:4
requirement 41:4
requirements 79:8
requires 50:16; 104:24
resale 49:19; 56:15
reseller 53:16
resellers 53:21; 56:7
reserve 47:16
resolved 106:12
resources 105:24;
106:1, 1
respect 10:17; 12:9, 14;
13:2, 3; 14:19, 24; 19:8,
17; 20:5; 23:6; 31:10, 23;
37:3; 38:11; 39:5; 70:20;
73:6; 75:19; 76:8, 22; 77:9;
78:3; 81:11; 84:7; 87:8;
90:13, 18, 19; 101:24;
108:17; 109:12, 19;
110:15
Respectfully 19:6
respective 12:1; 84:10;
94:24
respond 47:10
response 3:5; 5:16
responsibilities 102:15
responsive 91:6; 97:20;
98:6
rest 64:5; 103:16
restrictions 99:11
result 21:24; 22:8; 43:4;
50:1; 79:7, 15; 81:14; 95:5
resulted 44:24
retail 54:2
retailer 54:17; 55:7
retailers 52:12; 53:23;
54:9
retain 38:23
revealed 116:2
revenue 37:12
revenues 34:3

review 8:9; 39:5; 40:2;
42:12
reviewed 39:17; 40:5;
87:17
reviewing 12:6
revise 45:20
revising 14:13
revisited 15:18
Rich 4:14
Richard 3:20; 25:13
Rick 4:16
Right 24:20, 23, 24;
36:10; 47:16; 56:13, 13;
58:6; 59:9; 78:16, 19; 81:9;
93:4; 95:11; 96:10;
106:17, 20; 108:9; 114:10;
115:1
ring 71:7
ripe 21:23
Ripley 4:16
rising 94:18
Robert 4:22
Rod 7:13, 17
role 82:5
roles 4:4
Romero 80:20, 23; 81:1,
11, 14, 18, 20
room 97:10
rule 5:19; 28:15; 101:13;
102:12, 13, 16, 24
ruled 52:5
rules 108:13; 111:6
ruling 6:6, 6

S

S 7:2
safeguards 27:8; 38:13
sale 85:24; 86:4
sales 13:8, 9; 31:14;
32:12; 33:8, 10, 11; 34:3;
36:20; 65:21; 70:17; 71:5,
8; 73:7; 85:1; 87:21; 116:4
same 7:11; 31:15; 36:3;
43:7; 46:1; 59:14; 60:14;
61:16; 67:20; 73:8; 79:8;
84:23; 96:13; 113:1, 4, 20;
115:7
sample 53:12, 21; 59:18;
60:11, 17; 61:6, 8; 62:19;
63:17; 67:1, 6, 20; 68:7;
69:20, 23; 70:9, 14; 71:4;
74:8; 87:14; 99:5, 12;
108:2, 16; 109:19
sampling 56:7
sat 53:10
satisfied 8:14; 41:17;
78:1; 93:9
satisfies 28:8
saw 25:8; 32:11
saying 34:21; 61:6;
63:14; 67:4, 9; 77:13; 97:7;
100:10; 109:24; 113:17
schedule 10:8; 105:18;

**Phil Paul v.
Intel Corporation****Hearing
May 1, 2007**

107:24 scheduled 10:14 scheduling 10:23; 57:20 scope 91:23; 99:18 seal 116:3 seat 6:10 second 13:16; 25:18; 56:24; 57:16; 62:8; 64:20; 69:11; 75:2; 91:14; 105:1 secret 19:21; 20:1; 22:6; 40:24; 79:13, 13; 83:7; 112:13 secrets 34:19, 24; 35:4, 9 Section 8:1, 22; 45:1 secure 40:2 seek 16:23; 22:24; 23:5; 36:18, 19; 37:10; 41:21; 49:11; 61:16; 76:2; 79:6; 12, 17; 80:8; 84:24; 85:19 seeking 20:22; 28:23; 51:15; 75:21; 76:23; 79:13; 83:7; 93:13 seems 41:17; 71:24; 81:18; 94:7; 95:21; 102:13; 103:11; 104:7; 112:20; 113:5 segments 51:1; 52:14 select 64:13, 14 selecting 44:3 sell 55:9 seller 65:7 selling 70:13; 71:14 sells 53:17; 54:11 sense 54:1; 103:24; 105:17, 19; 106:18; 108:16; 110:7 sensitive 21:11; 34:14; 44:19 sent 89:9 sentences 116:14, 17 sentiment 72:7 separate 60:22 separately 97:4 September 15:11 serious 102:3 seriously 109:5 served 17:1; 58:10 serving 109:23 set 3:2; 39:5; 67:15, 19; 73:21; 74:22; 80:14; 115:1, 9 setting 105:14 settings 17:20 settled 51:8 seven 62:14 several 5:14; 116:16 severely 109:7 share 74:15, 19 shield 13:17 short 8:9; 43:8; 65:18; 95:8, 17, 19; 106:4 shorten 101:10, 17; 102:9; 103:8	shortened 102:18; 103:10 shortening 103:4 shot 111:16 show 32:12; 49:24; 50:11, 24; 52:9, 14; 54:20; 56:10; 61:12; 87:21 showing 52:3; 79:16; 80:8; 83:9 shown 55:15; 79:21; 82:20 shows 52:11; 62:9 side 82:15 sides 111:1 sight 36:5 sign 99:16; 108:21 signed 14:6, 17; 39:1 significant 14:22, 23; 55:23 similar 31:11 similarities 37:5 simply 17:5, 15; 45:4; 47:6; 63:18; 64:14; 66:19; 68:19; 112:4 single 52:15; 53:16; 54:20 sit 68:23; 92:1 sitting 84:1; 95:11 situation 16:18, 21 situations 104:13 SKUs 70:10, 12, 13, 16; 71:3, 4, 7, 14, 14; 78:18, 18 slight 31:17 slightly 23:4 Small 3:16; 6:12; 9:17; 15:20, 21; 16:5; 18:2, 22; 20:6, 7; 23:16, 18, 20; 24:10, 13, 20; 25:1, 3, 9, 20, 24; 27:19; 31:5, 6; 32:21; 33:1; 35:8; 38:9, 15, 16; 39:19; 40:9; 41:10; 43:24; 44:1; 47:5, 23; 48:2, 8, 18, 19, 21; 49:10; 51:12; 52:22; 56:3; 57:6; 58:1, 7; 59:5, 10, 17; 60:5, 8, 19, 22; 61:4, 11; 67:4; 70:23; 71:2, 12, 18; 72:6, 20; 73:3; 74:2; 75:2, 6, 12, 14; 87:8, 9; 88:3, 6, 10; 89:8; 90:2, 11, 23; 91:4; 93:18; 94:22; 95:21; 96:24; 97:8, 12, 15; 98:19; 99:1, 10, 23; 100:2; 104:12; 107:23; 113:22; 114:11, 16; 115:12, 17, 22; 116:1, 9, 10, 21 smaller 44:2 sold 54:7; 63:7 someone 48:4; 94:10; 100:9 sometime 107:5 somewhat 21:20; 72:18 somewhere 60:21 sorry 16:4; 97:8; 106:8	sort 51:13; 55:2; 58:18; 66:22 sought 17:1; 19:18; 21:4, 18; 22:4; 23:4; 26:10, 12; 37:7; 45:4; 78:15; 85:12 sound 42:14 sounding 42:13 sounds 98:23 source 88:23 sources 65:17, 21 South 81:20 speak 36:14; 56:2; 81:15; 108:4 speaking 43:11 SPECIAL 3:1, 13, 17, 22; 4:10, 17; 5:7, 12; 6:13; 9:19; 15:22; 16:2; 17:16; 18:18; 19:3; 20:4, 9; 21:5; 22:10, 14; 23:14, 19, 22; 24:7, 11, 17, 23; 25:2, 7, 10, 17; 26:5, 8, 15, 20; 27:11, 16, 19, 21; 29:18, 23; 30:15, 20; 31:2, 5; 32:20, 23; 35:7; 36:23; 38:7; 39:11; 40:8, 10, 14; 41:15, 22; 42:6, 10, 18; 47:1, 4, 11, 17, 20; 48:1, 3, 10, 20; 49:8; 51:6; 52:18; 55:21; 57:5, 17; 58:6, 20; 59:9, 16; 60:1, 6, 9, 20; 61:2, 10; 67:3; 70:19, 24; 71:6, 16; 72:15, 21; 73:24; 74:24; 75:4, 10, 13, 16; 76:10; 77:2, 16, 24; 78:11, 19; 80:16, 22; 81:7, 17; 82:2, 5, 22; 83:19; 84:15; 86:17, 21; 87:6, 24; 88:4, 9; 89:6, 17; 90:9; 91:2; 92:5; 93:4, 8; 94:3; 95:23; 96:5, 9, 18, 22; 97:6, 9, 14; 98:16, 22; 99:8; 100:1, 5, 14, 18; 102:14, 16; 105:10; 106:7, 13, 17, 20, 23; 107:11, 20, 22; 108:7; 109:12, 17; 110:19; 111:20; 112:17, 19; 113:9; 114:10, 14; 115:2, 13, 18; 116:9, 15, 22; 117:1 specific 16:14; 25:24; 29:13; 34:16; 74:13, 21 specifically 22:6; 73:10 spending 106:1 spirit 45:14 spoke 116:1 spoken 82:8 stage 80:10; 81:12; 84:14, 20 stall 108:11; 110:18 stand 50:3; 113:21 standard 30:16, 18; 52:3; 83:24 standing 26:23 start 48:21; 76:16 state 41:6; 60:15 stated 7:18 states 55:9 stay 91:3	step 106:15; 110:12, 13; 115:6 stepped 55:22 stepping 113:16 steps 74:12 still 36:18; 53:1; 93:21 stipulated 11:13 stipulation 39:22; 48:23; 49:2; 95:3 Stone 4:22; 5:9; 9:15; 15:24; 16:4; 19:5; 20:11; 21:16; 22:23; 24:5; 25:23; 26:7, 9, 17; 27:1, 13, 18; 37:1; 40:12, 15; 41:16; 42:4; 46:23; 47:2, 15, 18; 48:6; 69:14; 75:19; 76:19; 77:11, 22; 78:10, 12, 20; 80:21; 81:5, 15, 24; 82:18; 83:6; 84:3, 17; 86:19, 22; 92:6; 93:5, 11; 96:3, 7, 15, 20; 99:14; 100:6, 17; 106:6, 9, 14, 18, 21; 107:9, 16, 21; 108:3; 109:8, 14; 115:16 store 54:2, 12; 66:1 stores 54:9; 55:8; 77:21 strategy 54:19 strenuously 61:14 strikingly 31:11 strings 77:5 stronger 30:14 stuff 48:12 stumbling 79:9 style 11:4 subject 21:15; 72:17; 111:6; 112:7 submission 37:22; 45:19 submit 21:8; 30:8; 37:4; 56:18; 67:11, 18; 84:4; 92:22 submits 30:11; 41:12; 80:1; 87:3 submittal 12:5, 22 submittals 48:5, 5; 58:22 submitted 19:8, 13; 24:16; 33:3; 55:10; 63:13; 80:4; 85:16; 94:6 Subparagraph 12:15; 13:4 subparagraphs 12:16 subparts 26:2, 3 subpoena 3:5; 7:8; 17:1; 19:14; 20:14; 21:15; 22:17; 23:10, 19; 24:14; 25:4, 5, 6, 8, 14, 16; 26:1; 31:9, 10; 37:4, 7, 9; 53:16; 66:1; 72:17; 76:6; 98:6 subpoenaed 17:13; 19:16; 33:8 subpoenas 8:5; 31:18; 36:17; 58:10; 97:20 Subsequent 10:22; 15:5, 9; 100:8 subsequently 18:13;	28:5, 22 subset 68:4 substance 57:19; 98:18 substantial 57:2 substantially 15:2; 102:6 successful 104:17 suddenly 62:13 sufficient 14:23; 32:12; 34:9; 35:3, 13; 48:7; 49:22, 24; 70:11, 16; 78:6; 87:20; 89:24 sufficiently 55:15; 90:3 suggest 11:3; 43:1; 45:23; 48:4; 71:24; 76:11; 79:1; 80:14; 95:15; 96:1; 101:1, 8; 108:12; 114:24 suggested 12:2, 23; 86:24; 89:22 suggesting 21:6; 71:1, 13; 77:8, 18; 83:1; 86:11; 89:22; 102:2 suggestion 47:5; 102:8 suggestions 90:23 suggests 86:6 super 54:2 Supp 7:14 supplied 31:3 support 11:16 supports 92:22 suppose 114:8 sure 4:5; 6:12; 14:4; 30:17; 33:11; 37:21; 40:4, 9; 60:2; 71:11; 75:4, 12, 14; 88:9; 90:16; 93:19; 94:19; 96:10; 100:20; 104:6; 110:20; 116:20 surprised 52:9; 89:18 system 85:16, 24; 86:1; 90:15; 93:2; 94:11; 95:4, 5 systems 31:14, 15; 49:15; 55:3; 73:7, 8; 85:2
---	---	--	--	--

T

table 25:22; 91:3
tables 73:22
talk 22:3; 80:17; 95:13;
116:16
talked 97:1
talking 19:24; 31:21;
43:14; 78:17; 95:1; 111:10
talks 35:11; 64:4, 20;
88:14
target 21:20; 72:18, 24;
75:21
task 65:12
technical 66:13; 103:18,
20
technology 44:1
teleconferences 77:5
telling 85:10
ten 41:24; 42:3; 71:14;
96:11

Hearing
May 1, 2007

Phil Paul v.
Intel Corporation

<p>tens 23:11, 11 terms 67:24; 70:21; 101:23; 105:18; 113:12 testifying 38:22 testimony 94:12 theory 66:8 thereabouts 96:12 therefore 11:16; 13:15; 34:21; 50:9; 116:17 Third 8:16, 19; 9:5; 10:10, 15, 16, 21; 11:24; 12:19; 13:11; 14:10, 20; 16:11; 17:9, 10, 12; 18:4, 14, 16; 21:13; 28:4, 5; 29:24; 30:4, 5; 35:15, 23; 36:2; 38:12, 14; 43:5, 15; 45:4, 14, 15; 56:1; 58:10; 63:1; 69:17, 24; 78:14; 79:5, 8; 83:2, 4; 84:21, 23; 86:12 third-parties 14:13 third-party 4:4, 6; 21:15; 49:4 Thomas 3:21 though 22:2; 102:20; 108:19; 115:7 thought 68:21; 73:13 three 24:4, 5, 7; 48:6, 10; 69:13; 101:18; 102:9; 103:10 throughout 72:7 tier 13:16 tight 46:17 tightened 72:22 tiny 62:19; 68:7 today 4:8, 16, 24; 5:21; 6:4; 11:6; 12:21; 16:24; 20:18; 31:21; 36:15; 37:11; 42:15; 49:7; 52:20; 77:18; 85:9; 88:5; 91:17; 95:15; 98:8; 101:15, 22; 102:7; 107:17; 115:20 together 88:20, 24 told 44:22; 48:22; 90:14; 100:10 tomorrow 46:24; 47:21; 107:19; 109:16; 115:15; 116:24; 117:1 tonight 46:19 took 29:5, 17; 102:2 top 70:13; 71:14 topic 88:11 totally 114:8 track 92:15; 103:12 trade 19:20, 24; 22:6; 34:19, 24; 35:4, 9; 40:24; 79:12, 13; 83:7; 112:13 transaction 73:5; 85:1 transactional 3:4; 20:22; 21:9, 14, 17; 22:19; 32:2, 7, 19; 36:20; 50:10, 11; 59:8; 69:9; 70:3, 3, 5; 76:18, 20 transactionally 32:4, 15 transactions 65:6; 79:15; 84:19; 85:14; 92:16</p>	<p>transcript 30:19, 22, 24; 31:3; 42:1, 12; 43:10; 46:3, 10, 18; 47:7, 14, 19; 116:7, 8, 19, 19, 23 transferee 8:3, 11, 22, 24 translates 71:11 traveling 107:17 trial 34:17 Tricor 28:11 tries 52:17 try 65:10, 14; 69:5; 73:22; 88:13 trying 21:2; 30:4; 68:2; 97:18; 105:8 Tuesday 101:3 turn 9:21; 60:3; 66:1; 75:17; 81:9 two 23:3; 33:7; 41:8; 47:23; 66:22; 70:10, 16; 71:3; 84:9; 90:23; 92:23; 94:20; 97:22, 23, 23; 101:2; 104:13; 114:2; 115:6; 116:13 two-day 70:10 two-fold 111:2 two-step 106:3, 3, 4, 6; 110:11 two-tiered 12:20, 24; 13:22 type 31:20; 33:5, 24; 34:10, 20; 37:6; 50:18; 74:13, 16 types 33:21; 34:13; 51:2 typically 54:4</p>	<p>44:11 unring 27:2 unsimilar 105:15 unwilling 76:24 up 10:4; 23:21; 25:15; 39:5; 45:16; 48:5, 13; 55:22; 57:12; 66:18; 68:3; 81:8; 89:23; 90:24; 97:23, 23; 105:14; 109:23; 115:1 upon 28:1; 53:2; 80:14 use 30:16; 34:18; 43:17; 49:19; 50:23; 63:19; 65:7; 78:18; 86:9; 87:1; 93:17; 113:17; 116:12 used 38:2; 59:15; 72:19; 83:14; 100:7 useful 63:18 user 86:1 users 49:12; 50:7, 14; 51:3 using 44:5; 88:21; 105:24 utilization 42:22; 108:18</p>	<p>90:14; 92:15; 94:8, 22; 95:8; 103:13; 106:10; 113:23 ways 31:13; 92:24 weave 107:12 Wednesday 101:3 week 98:7, 12; 101:4 weeks 17:7, 8; 69:13 weigh 47:22 weighing 84:10 Welcome 5:8 Welding 7:13, 17 weren't 30:5 West 107:17 what's 99:6 where's 88:17; 89:2 whereas 21:7; 23:10; 34:16 who's 41:1; 44:18 whole 36:6; 63:11 wholly 63:4 willing 43:21; 45:13; 59:23; 74:14; 76:7 wind 48:5 withdrawn 36:17 within 74:22; 98:7, 12; 101:11, 18; 103:4; 105:20; 106:10 Without 10:12; 42:13; 59:3; 83:23 witnesses 95:10 words 70:15; 102:18 work 45:8, 15; 63:12; 86:15; 105:21; 108:24, 24 working 41:1 world 43:24; 44:1 write 71:10 written 8:8; 10:17; 12:5; 18:8; 30:21; 31:1; 82:9</p>
	<p>U</p> <p>U.S.C 8:1 ultimate 14:6; 22:21; 80:23; 103:13 ultimately 14:17; 19:9; 22:4, 21; 38:1; 51:24; 61:4; 69:19; 76:20; 104:5, 9 under 17:14; 26:4; 28:3, 17; 37:18; 51:17; 94:11, 12; 102:12; 112:13; 116:3 undergo 32:17 understood 32:18; 33:4, 18; 34:12; 39:2; 53:15 undertake 65:14 undertaking 99:17 undisputed 19:23; 79:11 unduly 79:22 unfair 90:22 unfortunately 64:1; 69:1 unique 10:5 uniqueness 10:7 unlawful 50:1; 52:13 unlawfully 49:23 unless 38:6; 70:18; 74:14; 82:6; 102:17; 104:19; 114:7 unlike 54:8 unreasonable 42:13, 14;</p>	<p>V</p> <p>V 7:1 value 63:22 valueless 114:9 vantage 89:24 variants 34:4 vastly 26:11; 27:3 vendor 13:13 version 116:7, 11, 18 versus 7:2; 80:20, 24; 81:1, 4 view 8:15, 17; 9:8; 13:7; 14:2, 9; 45:7; 63:4, 21 viewing 13:24 violation 26:23; 109:6 virtually 43:6; 67:20; 70:17; 89:15 virtue 5:15; 83:3; 101:13; 105:24; 113:14 Visx 7:1, 12 Volin 3:20; 24:15, 21; 25:12, 13; 71:22; 73:18; 74:3; 75:7; 87:2; 90:6; 92:18 volume 73:22</p>	
	<p>W</p> <p>wait 58:16; 60:16, 23; 61:17 waiting 96:17; 111:11 waiving 12:4 walks 65:24 wants 63:16 wasting 105:23 way 5:19; 32:6; 41:1; 42:23; 56:13; 58:11; 61:15; 63:15; 65:9; 67:7; 70:4; 73:11; 77:13; 84:23;</p>	<p>X</p> <p>X 7:2 x86 49:12, 23; 73:7</p>	
	<p>Y</p> <p>year 7:4, 16; 8:20; 14:22 yesterday 11:5</p>		

tens - yesterday (10)

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